TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, PETITIONER,

vs.

ARMOUR & COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1940.

CERTIORARI GRANTED JUNE 3, 1940.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 19, 1940.

—7546

[fol. a] [File endorsement omitted]

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

OCTOBER TERM, A. D. 1939

No. — Original

In the Matter of the Application of ARMOUR & COMPANY, an Illinois Corporation, for a Writ of Mandamus against the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and Against said District Court

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes the petitioner, Armour & Company, an Illinois corporation, and moves the court for leave to file the petition for writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable Frank L. Kloeb, Judge of the District Court of the United States, for the Northern District of Ohio, Western Division, and also directing the said District Court to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why your petitioner should not have such relief and such other and further relief in the premises [fol. 2] as may be just and proper.

Welles, Kelsey, Cobourn & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 2a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

PETITION OF ARMOUR & COMPANY FOR WRIT OF MANDAMUS—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of Armour & Company respectfully shows:

1. That at all times hereinafter mentioned prior to May 28, 1938, petitioner was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and maintained an office and place of business in the City of Toledo, Lucas County, Ohio, engaging in the business of selling at wholesale fresh meat and meat products. As of May 28, 1938, said Kentucky corporation was liquidated and its assets transferred to its sole stockholder, Armour & Com-[fol. 2b] pany, an Illinois corporation, which assumed the debts and obligations of said Kentucky corporation, and which has continued to maintain said office and place of business and to engage in the business of selling at wholesale fresh meat and meat products.

2. On February 1, 1935, an action was begun in the Common Pleas Court of Lucas County, Ohio, by George E. Kniess, a resident of Toledo, Lucas County, Ohio, as plaintiff, against petitioner and Charles J. Burmeister, a citizen and resident of Toledo, Lucas County, Ohio, as defendants, by filing a petition therein praying judgment in the amount of $100,000.00, said cause being Cause No. 141981 on the Docket of said Court of Common Pleas.

On February 6, 1935, separate actions were begun by Marie Kniess, a resident of the City of Toledo, Lucas County, Ohio, and Louisa F. Meinecke, a resident of the City of Toledo, Lucas County, Ohio, as plaintiffs against petitioner and Charles J. Burmeister as defendants, by filing their respective petitions therein praying judgment in each case in the amount of Fifty Thousand Dollars ($50,-000.00) said causes being Causes Nos. 142031 and 142032 on the docket of said Court of Common Pleas.

On March 2, 1935, separate actions were begun by Herbert O. Schwalbe, a resident of the City of Toledo, Lucas County, Ohio, and Maybelle Schwalbe, a resident of the City

[fol. 3] of Toledo, Lucas County, Ohio, as plaintiffs against petitioner and Charles J. Burmeister as defendants, by filing their respective petitions therein praying judgment in the amounts of Ten Thousand Dollars ($10,000.00) and One Hundred Thousand Dollars ($100,000.00), respectively, said causes being Causes Nos. 142359 and 142360 on the docket of said Court of Common Pleas.

The petitions in each of the above five mentioned cases are in all material respects identical. A copy of the petition in the George E. Kniess case is attached hereto, marked "Exhibit A" and made a part hereof.

3. Within the time allowed by law, your petitioner filed in said Court of Common Pleas in each of the causes referred to an identical (a) petition for removal to the District Court of the United States, (b) notice of filing the same, (c) bond on removal, and (d) motion for removal. Copies of such pleadings in the George E. Kniess case are attached hereto, marked "Exhibits B, B-1, B-2 and B-3" and made a part hereof.

4. Thereafter, the plaintiff in each of the causes referred to, requested and received a hearing in the Common Pleas Court of Lucas County, Ohio, on the petition for removal, and in each case the Common Pleas Court of Lucas [fol. 4] County, Ohio, denied said petition for removal and signed identical Journal Entries in all the cases. A copy of such Journal Entry in the George E. Kniess case is attached hereto, marked "Exhibit C" and made a part hereof.

5. On the 10th day of March, 1936, petitioner filed in each of the aforementioned causes an identical motion to reconsider the petition for removal. A copy of said motion in the George E. Kniess case is attached hereto, marked "Exhibit D" and made a part hereof.

6. On March 14, 1936, said Common Pleas Court of Lucas County, Ohio, denied said motion to reconsider the petition for removal in each cause, and an identical Journal Entry was filed in each cause. A copy of said Journal Entry in the George E. Kniess case is attached hereto, marked "Exhibit E" and made a part hereof.

7. Thereafter, the George E. Kniess case proceeded to trial, and the other four cases were by agreement of counsel

permitted to remain pending without any further action until disposition of the George E. Kniess case.

8. On November 30, 1938, the Supreme Court of Ohio rendered its decision in the George E. Kniess case (reported in 134 O. S. 432), the Court holding in the syllabi:

[fol. 5] "Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (Canton Provision Co. v. Gauder, 130 Ohio St., 43, approved and followed.)"

In the course of the opinion, the Supreme Court concluded:

"As the allegations of the petition stand it can hardly be said that the liability of Armour & Company would be the same when the pork was sold in metwurst as it would be if Burmeister had sold the Boston butts over the counter in the same form as he received them from Armour & Company. In either instance, however, the liability of Armour & Company was primary and that of Burmeister secondary. There was no privity of contract between Kniess and Armour & Company as there was between Kniess and Burmeister. Differing in degree, and differing in nature, the liability of Armour & Company and Burmeister cannot be joint. Their alleged torts were different in character and kind, and were not concurrent. Morris v. Woodburn, 57 Ohio St., 330, 48 N. E., 1097; Village of Mineral City v. Gilbow, 81 Ohio St., 263, 90 N. E. 800.

"For the reasons stated we are constrained to hold that a separable controversy did exist between the plaintiff [fol. 6] Kniess, and Armour & Company. The defendant, Armour & Company, adequately preserved its exceptions to the ruling of the court denying the petition for removal. * * * For the reasons stated the trial court erred, and the cause is therefore reversed and remanded to the Court of Common Pleas with instructions to grant the petition of

Armour & Company to remove the cause to the District Court of the United States." (Pages 444, 445.)

9. Thereafter, the said George E. Kniess filed in the Supreme Court of Ohio an application for a rehearing, which application was, on January 25, 1939, denied. On January 26, 1939, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County, Ohio, in the said George E. Kniess case. A copy of said mandate is attached hereto, marked "Exhibit F" and made a part hereof. Said mandate provides in part:

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and this cause is hereby remanded to said Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the District Court of the United States."

[fol. 7] 10. On February 10, 1939, pursuant to the mandate of the Supreme Court, the Common Pleas Court of Lucas County, Ohio, set aside the prior order denying the petition and order for removal and set aside the prior order denying the motion to reconsider said petition for removal and ordered the George E. Kniess cause removed to the District Court of the United States for the Northern District of Ohio, Western Division. A similar journal entry was entered on February 10, 1939 in each of the other four causes. The journal entries in the George E. Kniess case and the Marie Kniess case are attached hereto, marked "Exhibits G and G-1", and made a part hereof.

11. Pursuant to said orders, a transcript of the record in each case, certified as required by law, was filed on February 17, 1939, in the District Court of the United States for the Northern District of Ohio, Western Division. Said transcripts of the records included all the pleadings, papers and journal entries heretofore referred to and made a part

of this petition as exhibits. The George E. Kniess case was docketed by the District Court as Civil Action No. 4338, Louisa F. Meinecke case as Civil Action No. 4339, Marie Kniess case as Civil Action No. 4340, Herbert Schwalbe case as Civil Action No. 4341 and Maybelle Schwalbe case as Civil Action No. 4342.

[fol. 8] 12. On February 20, 1939, pursuant to the Federal Rules of Civil Procedure, petitioner filed in each of said causes in the District Court of the United States, an identical separate answer.

13. On the 22nd day of February, 1939, an identical stipulation was filed in each case in said District Court permitting the plaintiffs to file an amended complaint without prejudice to the rights of the defendants to move to strike any new matter, said stipulations further providing that the defendants' answers should stand as answers to the amended complaint. A copy of said stipulation in the George E. Kniess case is attached hereto, marked "Exhibit H", and made a part hereof.

14. On the 22nd day of February, 1939, the plaintiff in each of said causes filed an amended complaint in the District Court, said complaints being in all material respects identical. On March 1, 1939, defendant, Charles J. Burmeister, filed an identical answer in each case.

15. On the 3rd day of March, 1939, the plaintiff in the George E. Kniess cause filed a motion to remand said cause, together with two affidavits in support thereof, which motion and affidavits in support thereof are attached hereto, marked "Exhibits J, J-1 and J-2", respectively, and made a part hereof.

[fol. 9] 16. On the 6th day of March, 1939, the plaintiff in each case, except the George E. Kniess case, filed an identical motion to remand said cause, together with an affidavit in support thereof. A copy of said motion to remand and affidavit in support thereof in the Marie Kniess case are attached hereto, marked "Exhibits K and K-1", respectively, and made a part hereof.

17. On the 16th day of March, 1939, petitioner filed in said District Court in the George E. Kniess cause a motion, pursuant to Judicial Code Section 274 (28 U. S. C. A., Section 399), to amend Armour & Company's petition for removal

to correctly state the facts in the event it was ascertained that George E. Kniess was a citizen and subject of Germany as he claimed in his motion to remand.

18. On April 1, 1939, the Honorable Frank L. Kloeb, as Judge of the United States District Court for the Northern District of Ohio, Western Division, and said Court entered an identical order in each case sustaining the motion to remand. A copy of said order of remand in the George E. Kniess case is attached hereto, marked "Exhibit L", and made a part hereof. Said Judge and said Court did not render any opinion on the motion to remand.

19. On April 22, 1939, petitioner filed in each of said cases in said District Court, a motion to vacate and set aside said order of remand. A copy of said motion in the George E. Kniess case is attached hereto, marked "Exhibit M", [fol. 10] and made a part hereof. On June 22, 1939, said District Court, without rendering any opinion, overruled said motions to vacate and set aside said orders of remand.

20. In the opinion of your petitioner's counsel, the orders of the District Court in each cause necessarily hold that a separable controversy was not presented and purport to exercise jurisdiction that said judge and said court do not possess, i. e., a jurisdiction to review and reverse the decision and order of the Supreme Court of Ohio and the orders of the Court of Common Pleas of Lucas County, Ohio, which decision and orders are conclusive on all courts, including said United States District Court, subject to such review by appeal or error as may exist in the Appellate Courts of Ohio and the Supreme Court of the United States.

21. In the opinion of your petitioner's counsel, the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, have full and complete jurisdiction to determine whether or not the plaintiff's petition in these causes stated a joint cause of action against your petitioner and Charles J. Burmeister, the other defendant, and that question is determined exclusively by the laws of Ohio on that subject as construed by the courts of Ohio.

22. In the opinion of your petitioner's counsel, the plaintiff, George E. Kniess, sought, and after a full hearing, secured, the opinion and decision of the Supreme Court of Ohio, and the plaintiffs in each of the other four cases

[fol. 11] sought, and after a full hearing, secured, the opinion and decision of the Court of Common Pleas of Lucas County, Ohio, on that precise question, and said decisions are, as between the parties to each of said causes, res adjudicata and final.

23. In the opinion of your petitioner's counsel, the United States District Court for the Northern District of Ohio, Western Division, and the Honorable Frank L. Kloeb, as Judge of the said Court, are required by 28 U. S. C. A. 687 (R. S. 905) to give full faith and credit to the final orders and decisions in these causes entered, after full hearings accorded all parties in interest, by the Supreme Court of Ohio and by the Court of Common Pleas of Lucas County, Ohio.

24. In the opinion of your petitioner's counsel, said motions to remand did not, and could not, present any question for determination by the said Honorable Frank L. Kloeb or the said District Court that had not theretofore been presented to and finally and conclusively determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio.

25. In the opinion of your petitioner's counsel, the United States District Court for the Northern District of Ohio, Western Division, and the Honorable Frank L. Kloeb, as Judge of said Court, has jurisdiction of the subject matter, according to the laws of the United States, and juris-[fol. 12] diction of the parties by their appearance and pleading in said causes, and the Court cannot decline to consider the cases on their merits and divest itself of jurisdiction thereof by the Order to Remand.

26. In the opinion of your petitioner's counsel, said order of remand in the George E. Kniess case further denies to your petitioner the right to amend the petition for removal as requested in the petitioner's motion therefor, pursuant to Judicial Code Section 274c (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

27. In the opinion of your petitioner's counsel, the amended complaint filed by the plaintiff in each cause (as set forth more fully in Paragraph 14 hereof) and the stipulation filed in each cause (as set forth more fully in Paragraph 13 hereof) waived any defects in the removal pro-

ceedings, which defects, if in fact they exist, were but formal and modal, and the filing of said amended petition and said stipulation was a submission to the Federal jurisdiction and a consent to the removal proceedings, for which reason plaintiff in each cause was estopped to question the jurisdiction of the United States District Court.

28. In the opinion of your petitioner's counsel, said Judge and said Court in remanding said causes have transcended the jurisdiction of said court and undertaken the exercise of powers not vested in him or his court by any law of the United States.

[fol. 13] 29. In view of the fact that the District Court has entered orders in these causes in complete disregard of the prior adjudication of the same question by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, and for the other reasons heretofore stated, there is involved, in the opinion of your petitioner's counsel a question of public importance, which question is of such a nature that it is peculiarly appropriate that action be taken by this court.

30. In the opinion of your petitioner's counsel, a writ of mandamus should issue from this court in order to expedite the settlement of the important question involved, and, incidentally, in furtherance of the general policy of a prompt trial and disposition (28 U. S. C. A. 71, 80; Federal Rules of Civil Procedure, Rule 81(c)) of causes removed from the state courts to the courts of the United States.

Wherefore, your petitioner, being without remedy other than that sought herein, prays that a rule be made and issued from this Honorable Court directed to the said Honorable Frank L. Kloeb, Judge of the United States District Court for the Northern District of Ohio, Western Division, and to said United States District Court for the Northern District of Ohio, Western Division, to show cause why a writ of mandamus should not issue commanding the [fol. 14] said Judge and said Court, and each of them, to grant petitioner's motion to set aside and vacate the said order of remand in each of the said causes, and to grant the petitioner's motion to amend the petition for removal in the George E. Kniess cause and to continue to proceed in

all of said causes, and why your petitioner should not have such other and further relief in the premises as may be just and proper.

Welles, Kelsey, Cobourn, & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 15] EXHIBIT "A"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

PETITION—Filed February 1, 1935

Defendant Armour & Company, Toledo, Ohio, is a corporation, having an office and place of business in the City of Toledo, Lucas County, Ohio, and is engaged in the business of slaughtering swine and other animals, and selling and offering for sale at wholesale the meat from the carcasses of such animals so slaughtered for food for human consumption.

Defendant Charles J. Burmeister owns and operates a grocery and meat store in the City of Toledo, Lucas County, Ohio, for the sale at retail of foods and food products for human consumption.

On or about the month of October, 1934, the exact date being unknown to plaintiff, defendant Armour & Company offered for sale in said City of Toledo, as being wholesome, untainted, without disease and in all respects fit for human food, certain articles of food known in the meat trade as Boston butts, the same being the shoulders of swine, or a part thereof, and said defendant sold at wholesale certain

[fol. 16] of said Boston butts as and for human food purposes to defendant Charles J. Burmeister.

Said Burmeister thereupon ground or chopped the meat of said Boston butts into small particles and mixed the same with certain condiments, the precise nature of which is unknown to plaintiff, but which were not pork or meat products, and thereby made the same into a kind or form of sausage known as metwurst. Said Burmeister then caused said mixture to be smoked or cured by placing and keeping the same in the smoke of smoldering hickory logs or chips for about a week. About October 20, 1934, he offered the same for sale at his aforesaid store, as a food product ready for human consumption without cooking or further treatment.

On or about said 20th day of October, 1934, plaintiff purchased a portion of said metwurst from said Burmeister, and ate of the same.

Plaintiff further says that each of said defendants was negligent in that said Boston butts so offered for sale and sold by each of said defendants in the manner aforesaid, and of which plaintiff partook as aforesaid, were not wholesome food or provisions for human consumption, but that said Boston butts, and thereby the metwurst made of the same, were adulterated, diseased, and infected in that the same then and there contained and were infected with parasites known as trichinae, by reason whereof the said Boston butts and the metwurst made of the same were wholly unfit, unsuitable and dangerous for consumption by plaintiff or any other person; contrary to the laws of the State of Ohio. [fol. 17] Said trichinae or parasites infect only swine, and such infection occurs solely in such swine through their eating matter containing such parasites, which said parasites thereafter lodge in the flesh of the swine before the animal is slaughtered.

Solely by reason of his having partaken of said metwurst, the meat part of which was so infected with said parasites, plaintiff contracted the disease known as trichinosis, through such parasites having entered his body in said food and there propagated, multiplied and increased.

Plaintiff further says that said disease is permanent and incurable; that no method is known to science at this time of eradicating and destroying said parasites in his body;

that they have lodged in his arms, shoulders and body, particularly the muscular tissues and parts thereof, and have attacked his eyes; that his sight is permanently impaired; that he has become debilitated and suffers, and will continue to suffer, great pain and anguish; that he is now compelled to take medical treatment, and will be obliged to continue such treatment for the rest of his life in order to check so far as may be the ravages of said disease; that his health is permanently impaired and injured and his life in constant danger.

Before being stricken with said disease plaintiff was in good health, was of the age of thirty years, and was able to and did earn approximately the sum of $47.50 per week, but that now his ability to work and earn money has been permanently impaired and diminished.

[fol. 18] And plaintiff says that by reason of the aforesaid acts and conduct of said defendants he has been damaged in the sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore plaintiff asks judgment against said defendants in said sum of One Hundred Thousand Dollars ($100,000.00) and for his costs herein expended.

(Signed) Boggs & Chase, and Percy R. Taylor, Attorneys for Plaintiff.

Duly sworn to by George E. Kniess. Jurat omitted in printing.

PRAECIPE

141981

To the Clerk:

Please issue summons for the defendants in the above entitled cause directed to the Sheriff of Lucas County, Ohio, returnable according to law. Endorse thereon "Action for money, amount claimed $100,000.00."

(Signed) Boggs & Chase and Percy R. Taylor, Attorneys for Plaintiff.

[fol. 19] EXHIBIT "B"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio,
Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES—Filed March 1, 1935

Your Petitioner, Armour and Company, says that it is one of the defendants in the above entitled action, which said action was begun in the Court of Common Pleas on the 1st day of February, 1935, and that the time for defendant to plead, answer or demur in said suit has not yet expired under the laws of the State of Ohio; that said suit is one of a civil nature at common law, of which the District Courts of the United States have original jurisdiction; that the matter in dispute exceeds the sum of Five Thousand and no/100 Dollars ($5,000.00), exclusive of interest and costs; that this case does not arise under an act of the United States of America entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees" in certain cases approved April 22, 1908, or any amendment thereto.

Your Petitioner, Armour and Company, respectfully shows that the plaintiff was at the time of the commencement of said suit, ever since has been and now is a citizen of the State of Ohio and a resident and citizen of the City of [fol. 20] Toledo, Lucas County, State of Ohio; that the defendant, Charles J. Burmeister, was at the time of the commencement of this suit, ever since has been and now is a citizen of the State of Ohio and a resident and citizen of the City of Toledo, Lucas County, State of Ohio; that the defendant Armour and Company, was at the time of the commencement of this suit, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; that the plaintiff seeks to recover damages against Armour and Company for

claimed injuries to person due to an alleged unwholesome condition of certain meat sold by Armour and Company to Charles J. Burmeister and eaten by plaintiff.

Your Petitioner, Armour and Company, herewith files a good and sufficient bond under the statutes in such cases made and provided, conditioned as the law directs that it will, within thirty (30) days from the filing of the petition for removal, file a certified copy of the record of this cause in the District Court of the United States for the Northern District of Ohio, Western Division, and for the payment of all costs which may be added by said Court if the said District Court shall determine that this suit is improperly and wrongfully removed thereto.

Your Petitioner, Armour and Company, therefore prays that this cause proceed no farther herewith, except to order a removal of said cause to said District Court of the United States and to accept the bond herewith presented, and direct the Clerk of this Court to provide a certified transcript of [fol. 21] the record of this cause as required by law.

Tracy, Chapman and Welles, Attorneys for the Defendant, Armour and Company.

Duly sworn to by Edward W. Kelsey, Jr. Jurat omitted in printing.

[fol. 22] EXHIBIT "B-1"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

NOTICE—Filed March 1, 1935

To Boggs & Chase and Percy R. Taylor, Attorneys for Plaintiff:

Please take notice that on the 1st day of March, 1935, the defendant, Armour & Company, will file in this cause a petition for removal to the District Court of the United

States for the Northern District of Ohio, Western Division, copy of which petition, motion and bond are attached hereto.

Said motion will be submitted to the Court on March 2, [fol. 23] 1935, or as soon thereafter as the Court may hear same.

(S.) Tracy, Chapman & Welles, Attorneys for Defendant, Armour and Company.

March 1, 1935.

This will acknowledge receipt of copy of the within notice and pleadings therein referred to.

(S.) Boggs, Chase & Percy R. Taylor, Attorneys for Plaintiff.

[fol. 24] EXHIBIT "B-2"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

BOND ON REMOVAL—Filed March 1, 1935

Know All Men by These Presents: That,

We, Armour & Company, as principal, and Maryland Casualty Company as surety, are held and firmly bound unto George E. Kniess, plaintiff in the above entitled cause, his successors and assigns, in the sum of Five Hundred Dollars ($500.00) lawful money of the United States of America, for the payment of which well and truthfully to be made, we, and each of us, bind ourselves, and each of us, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that:

[fol. 25] Whereas, Armour & Company, has applied by petition to the Common Pleas Court, Lucas County, State

of Ohio, for the removal of a certain cause therein pending, wherein George E. Kniess is plaintiff and the said Armour & Company is defendant, to the District Court of the United States for the Northern District of Ohio, Western Division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said cause in said Court of Common Pleas be stayed.

Now, Therefore, if your petitioner, the said Armour and Company shall enter in said District Court of the United States for the Northern District of Ohio, Western Division, aforesaid, within thirty days from the filing of said petition a certified copy of the record of such suit and shall pay or cause to be paid all costs that may be taxed therein by said District Court of the United States for the Northern District of Ohio, Western Division, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

Armour & Company, by (S.) R. E. Peossall, Principal; by (S.) N. H. Schnieder, Surety.

[fol. 26] EXHIBIT "B-3"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR AND COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

MOTION—Filed March 1st, 1935

Now comes the defendant, Armour and Company, and moves the Court for an order removing this cause to the District Court of the United States for the Northern District of Ohio, Western Division, in accordance with the Petition for Removal filed herein.

(S.) Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour and Company.

[fol. 27] EXHIBIT "C"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed March 6, 1935

This day defendant Armour & Company presented to the court its petition and bond to remove the above entitled case to the District Court of the United States for the Western Division of the Northern District of Ohio, which were filed herein on March 1, 1935; and the court, having duly considered said petition, together with the record in said cause, including the petition filed by the plaintiff herein, and heard argument of counsel, finds that said petition for removal and bond were filed within the time allowed by law for the same. The court further finds that upon said record no separable controversy is shown, and said defendant is not entitled to the order of removal prayed for in its said petition, and its application for removal is therefore denied; to all of which the said defendant Armour & Company, by its attorneys, excepts.

(S.) James S. Martin, Judge.

[fol. 28] EXHIBIT "D"

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

MOTION TO RECONSIDER PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES—Filed March 10th, 1936

Now comes your petitioner, Armour & Company, by its attorneys, Welles, Kelsey & Cobourn, and, not waiving or

intending to waive any rights heretofore set up by its prior pleadings in this cause and still relying and insisting upon its exceptions to each and all of the prior adverse orders of this court, respectfully shows that:

1. The petition for a removal of this cause to the District Court of the United States and a bond therefor were duly filed in this cause within the time allowed by law.

2. By journal entry filed herein on March 5, 1935, said petition was denied by this court upon the ground that "upon said record no separable controversy is shown and said defendant is not entitled to the order of removal prayed for in its said petition", to which order this defendant duly saved its exceptions.

[fol. 29] 3. That in a case decided on June 19, 1935, and reported on June 24, 1935, by the Supreme Court of Ohio, entitled The Canton Provision Company v. Gauder, 130 O.S. 43, said court decided that the liability of the wholesaler and retailer of food products was not a joint liability but a several one.

4. This defendant is advised by counsel that the foregoing opinion is determinative of the questions presented by the petition to remove in this case, and that said petition should be granted.

Wherefore, your petitioner moves the court for a reconsideration of the petition to remove this cause to the District Court of the United States, and prays that said petition for removal be granted.

Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour & Co.

A brief in support of the foregoing motion is attached to and made a part of an identical motion in the case of Louisa F. Meinecke, Plaintiff, v. Armour & Company, et al., Defendants, No. 142032, to which the court is referred.

Welles, Kelsey and Cobourn, Attorneys for Defendant, Armour & Co.

[fol. 30] EXHIBIT "E"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed March 13, 1936

This cause came on to be heard upon the motion of defendant Armour & Company to reconsider the said defendant's petition for the removal of this cause to the District Court of the United States for the Northern District of Ohio, Western Division, and was argued by counsel and submitted to the court.

Upon consideration whereof the court finds that said motion ought to be, and is hereby, overruled; to all of which finding and order defendant Armour & Company at the time excepts.

James S. Martin, Judge.

OK. Welles, Kelsey & Cobourn, Attorneys for Deft. Armour & Co.

[fol. 31] EXHIBIT "F"

SUPREME COURT OF THE STATE OF OHIO

No. 27044

January Term, A. D. 1939

To-wit: November 30, 1938

THE STATE OF OHIO,
City of Columbus:

GEORGE E. KNEISS, Plaintiff & Appellee,

vs.

ARMOUR & COMPANY, Defendant & Appellant, et al.

Appeal from the Court of Appeals of Lucas County

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered

and adjudged by this Court that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and this cause is hereby remanded to said Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the District Court of the United States.

It is further ordered and adjudged that appellant recover [fol. 32] from appellee its costs expended in this Court, in the Court of Appeals and in the Court of Common Pleas for all proceedings subsequent to the date the petition for removal was filed, taxed at $—.

Ordered, That a special mandate be sent to the Court of Common Pleas of Lucas County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Lucas County, "for entry."

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this 7th day of December, 1938.

(S.) Seba H. Miller, Clerk, (S.) By Elliot E. Welch, Deputy. (Seal.)

SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus:

To the Honorable Court of Common Pleas.

[fol. 33] Within and for the County of Lucas, Toledo, Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of our Supreme Court of Ohio, in the cause of George E. Kneiss, Plaintiff & Appellee, vs. Armour & Company, Defendant & Appellant, et al., into execution.

Witness, Seba H. Miller, Clerk of our said Supreme Court of Ohio, at Columbus, this 7th day of December, A. D. 1938.
(S.) Seba H. Miller, Clerk, By (S.) Elliott E. Welch, Deputy. (Seal.)

Docket Fee $20.00 Paid by Welles, Kelsey & Cobourn.
Docket Fee $2.00 Paid by Percy R. Taylor.

[fol. 34] EXHIBIT "G"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 141981

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY, et al., Defendants

JOURNAL ENTRY—Filed February 10, 1939

This day this cause came on to be heard upon the mandates from the Supreme Court of Ohio to this court, said mandates being dated December 7, 1938, and filed in this court on January 26, 1939, remanding said cause to this court with instructions to grant the petition to remove the cause to the District Court of the United States, and upon the motion and petition of defendant Armour & Company for removal of this cause from this court to the District Court of the United States, for the Northern District of Ohio, Western Division; and it appearing to the court and the court having heretofore found that defendant Armour & Company has filed with its petition for removal herein a bond, with good and sufficient surety, conditioned according to law, and that due notice thereof was given plaintiff; and it further appearing and the court having heretofore [fol. 35] found that said petition for removal, motion and bond were filed within the time allowed by law for the same;

It is, accordingly, ordered that the prior order of this court entered herein on or about March 6, 1935, denying said petition and motion for removal and the prior order of this court entered herein on or about March 14, 1936, denying the motion of Armour & Company to reconsider said petition for removal, be and each of said orders hereby is vacated, set aside and held for naught.

It is further, accordingly, ordered that said bond be and it is hereby accepted and approved by this court, and that

said cause be and it hereby is removed from this court to the District Court of the United States, for the Northern District of Ohio, Western Division, and that further proceedings herein be and they are hereby stayed, and that the clerk of this court be and is hereby directed and ordered to make a transcript of the record herein and certify the same as required by law.

To all of the foregoing findings and orders of the Court the plaintiff objects and excepts.

(Sgd.) Roy B. Stuart, Judge.

Dated: February 10, 1939.

[fol. 36] EXHIBIT "G-1"

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 142031

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY et al., Defendants

JOURNAL ENTRY—Filed 2/10/39

The court's attention having been called to the decision of the Supreme Court of Ohio rendered on November 30, 1938, in the affiliated case of George E. Kniess vs. Armour & Co., et al., and reported in 134 O. S. 432; and the court taking judicial notice of the mandate in said cause returned to this court on January 26, 1939, on the court's own motion, this cause came on further to be heard this day on defendant Armour & Company's motion and petition for removal of this cause from this court to the District Court of the United States, for the Northern District of Ohio, Western Division; and it appearing to the court that said cause is removable under the statutes of the United States, and it appearing further and the court having heretofore found that defendant Armour & Company has filed with its petition for removal herein a bond, with good and sufficient surety, conditioned according to law, and that due notice thereof was given to plaintiff; and it further appearing and the court having heretofore found that said petition for removal, motion and bond were filed within the time allowed by law for the same;

It is, accordingly, ordered that the prior order of this [fol. 37] court entered herein on or about March 6, 1935, denying said petition and motion for removal and the prior order of this court entered herein on or about March 14, 1936, denying the motion of Armour & Company to reconsider said petition for removal, be and each of said orders hereby is vacated, set aside and held for naught.

It is further, accordingly, ordered that said bond be and it is hereby accepted and approved by this court, and that said cause be and it hereby is removed from this court to the District Court of the United States, for the Northern District of Ohio, Western Division, and that further proceedings herein be and they are hereby stayed, and that the clerk of this court be and is hereby directed and ordered to make a transcript of the record herein and certify the same as required by law.

To all of the foregoing findings and orders of the Court the plaintiff objects and excepts.

Roy R. Stuart, Judge.

Dated: February 10, 1939.

[fol. 38] EXHIBIT "H"

DISTRICT COURT OF THE UNITED STATES OF AMERICA, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4338

GEORGE E. KNIESS, 601 Lincoln Avenue, Toledo, Ohio, Plaintiff,

vs.

ARMOUR & COMPANY, 2 South Erie Street, Toledo, Ohio, and Charles J. Burmeister, 3105 Darlington Road, Toledo, Ohio, Defendants

Filed 2/21/39

To the Clerk:

We, the Attorneys for the respective parties, do hereby stipulate that plaintiff may file his amended complaint herewith, without prejudice to the rights of the defendants to move to strike any new matter, and that the defendants' answers may stand as answers to the amended complaint.

Percy R. Taylor, Attorney for Plaintiff. Welles, Kelsey, Cobourn & Harrington, Attorney- for Defendant. Wm. F. Miller, Attorney for Defendant.

Notice Waived under Rule 77-D.

It is so ordered:

Frank L. Kloeb, U. S. District Judge.

[fol. 39] EXHIBIT "J"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO REMAND CAUSE TO COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO—Filed March 2, 1939

Now comes the plaintiff in the above entitled cause, by his attorneys Nolan Boggs and Percy R. Taylor, and moves the Court to remand said cause to the Court of Common Pleas in and for the County of Lucas and State of Ohio, on the ground that this Court is without jurisdiction to hear and determine the cause and is without jurisdiction of either of the parties to or the subject matter of this suit for the reasons following:

1. Said cause is not one removable under the statutes and laws of the United States from said State Court to said United States District Court, for that plaintiff at the time of filing his said petition in said Court of Common Pleas was, and still is, an alien and not a citizen of the State of Ohio or of the United States; plaintiff having been born in the Country of Germany and being a citizen or subject [fol. 40] of that country and having come to the United States in the year 1925, after which he duly filed his application for his preliminary or first naturalization papers, but has not yet obtained his final naturalization papers or certificate and, therefore, is still not a citizen as aforesaid.

2. Said cause of action was improperly and unlawfully removed from said Court of Common Pleas to said United States District Court.

3. This is a suit to recover on a tort in which the actual facts, as shown upon the trial of said cause in the Court of Common Pleas of Lucas County, Ohio, are that defendants Armour & Company and Charles J. Burmeister are jointly liable to plaintiff. The facts constituting such joint negligence were not pleaded in plaintiff's petition filed in said court. It further appearing that said defendant Charles J. Burmeister has at all times been and is now a resident and citizen of the State of Ohio, this Court has no jurisdiction over this cause, and defendant Armour & Company is not entitled to remove this cause to this court.

In support of the foregoing motion, the plaintiff hereby refers to the affidavits hereto attached and made a part hereof, marked "Exhibit A" and "Exhibit B."

(Signed) Nolan Boggs and Percy R. Taylor, Attorneys for Plaintiff.

Pursuant to Rule 5 of the Federal Rules of Civil Pro-
[fol. 41] cedure, copies of this motion and of the brief in support of the same have been delivered to E. W. Kelsey, Jr., and Welles, Kelsey, Cobourn & Harrington, 807 Ohio Building, Toledo, Ohio, attorneys for defendant Armour & Company, and to Wm. F. Miller, 511 Edison Building, attorney for defendant Charles J. Burmeister, this 2nd day of March, 1939.

(Signed) Percy R. Taylor, Attorneys for George E. Kniess.

[fol. 42] EXHIBIT "J-1"

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

George E. Kniess, being first duly sworn, deposes and says as follows:

This affiant was born on February 2, 1904, of German parents, in Eberstadt, Hessen, Germany. Affiant came to

the United States from Hamburg, Germany, arriving in the United States on September 3, 1925.

On March 3, 1928, affiant duly filed his Declaration of Intention to become a citizen of the United States, in the office of the Clerk of the Court of Common Pleas of Lucas County, Ohio, the same being application No. 13102 on the records of said court.

Thereafter, about July 6, 1931, affiant moved from his then residence in the City of Toledo, Ohio, to the City of Washington, in the District of Columbia, where he remained for some years.

[fol. 43] On July 5, 1932, affiant, while residing in said City of Washington, prepared his application for preliminary form for citizenship and presented the same at the office of the District Director of Naturalization, of the United States Department of Labor, at No. 462 Indiana Avenue, N. W., Washington, D. C. He was then and there told by the person apparently in charge of said office that he must wait for a time, but affiant does not know the reason for such advice or instruction so given to him.

Affiant supposed that he would be notified by said District Director of Naturalization when his said application would be considered, but has never been so advised.

By reason of the aforesaid facts, this affiant has never received his final Certificate of Naturalization as a citizen of the United States, and is not a citizen of the United States or of any state thereof, but is a citizen of Germany.

Affiant did not know or understand that he must file a petition for citizenship within seven years from the time of filing his Declaration of Intention to become such citizen, until now, and supposed that he had complied with the law in that respect, as aforesaid. Affiant, within the last week, for the first time advised his attorneys Percy R. Taylor and Nolan Boggs that he had not obtained his final Certificate [fol. 44] of Naturalization and pursuant to their advice, now given, is now filing his new preliminary application to become a citizen, with the Immigration and Naturalization Service, Detroit, Michigan, as affiant is married to an American citizen.

(Signed) George E. Kniess.

Sworn to before me, the undersigned, a Notary Public in and for Lucas County, Ohio, by the said George E.

Kniess, and by him subscribed in my presence, this 2nd day of March, 1939.

(Signed) Anthony S. Barone, Notary Public, Lucas County, Ohio. Com. expires 3/15/40. (Seal.)

[fol. 45] EXHIBIT "J-2"

In the District Court of the United States for the Northern District of Ohio, Western Division

No. 4338

GEORGE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

Percy R. Taylor, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff George E. Kniess in the above entitled cause, and has been such attorney since the filing of said suit in the Court of Common Pleas of Lucas County, Ohio, in which court its docket number was 141981.

Affiant further says that on the second and last trial of said cause in said Court of Common Pleas, the defendant Charles J. Burmeister, on cross-examination by Nolan Boggs, one of the attorneys of plaintiff, testified, as follows, as appears on pages 16 and 17 of the Bill of Exceptions taken on the trial of said cause and pages 46 to 49, inclusive, of the printed record of said cause filed in the Supreme Court of the State of Ohio:

"Q. Mr. Burmeister, calling your attention to 1934, did you make any purchase in the month of October of that year from Armour & Company of what is known in the trade as Boston butts?

A. Yes, sir.

[fol. 46] "Q. Can you recall when you made your first purchase of Boston butts, from them?

A. Yes, they were delivered in October, on the 8th, I think, on a Monday, but they were ordered several days before that.

"Q. And how did you order them and from whom did you order them?

A. Well, they asked me several weeks before whether I needed some butts for making metwurst and I told them——

"Q. Who asked you?

A. Ed Hauptman, the salesman.

"Q. What did he say?

A. He asked whether I needed some butts for making metwurst.

"Q. That is several weeks before October 4th?

A. Yes sir.

"Q. What did you tell him?

A. I told him I wasn't ready, the weather was too warm.

"Q. What if anything happened after that about ordering butts from Armour & Company?

A. I didn't understand the question. (Question withdrawn.)

"Q. Who is Mr. Ed. Hauptman, if you know?

A. He is salesman for Armour & Company that called on me.

"Q. On this occasion did he call on you or phone you?

A. No, he called on me but later on there was another salesman in the house that called me up and asked me about it.

"Q. Now I am referring to the fall of 1934, in October.

A. Yes sir.

"Q. And you placed your order on October 4th, is that correct, with Armour & Company?

A. Yes sir.

"Q. For how many Boston butts, what quantity?

A. About 300 pounds.

"Q. And you say some two weeks before that is when Mr. Ed Hauptman of Armour & Company called on you and wanted to know if you were ready for Boston butts to make metwurst?

A. I wouldn't say it was Hauptman or the man at the house, but they asked me about it.

[fol. 47] "Q. Who was the other man?

A. George Gradel.

"Q. It was either Mr. Hauptman or George Gradel that called you and wanted to know if you were ready to make metwurst?

A. Yes sir.

"Q. And that was about two weeks prior to October 4th, 1934?

A. That is right.

"Q. And they also wanted to know whether or not you were ready for Boston butts, is that right?

A. Yes sir.

"Q. Then later on did Mr. Hauptman call at your place of business and you gave him this order, or did you give it to him on the telephone?

A. He called at the place of business.

"Q. And you gave him the order for the Boston butts, 300 pounds, on October 4th, 1934?

A. Yes.

"Q. And you say they were delivered to you on Monday, October 8th?

A. The following Monday, yes sir.

"Q. Now Mr. Burmeister, when you gave this order to Mr. Hauptman on October 4th, I wish you would tell the jury just what was said by Mr. Hauptman to you or by you to Mr. Hauptman about these Boston butts and the making of metwurst at that time on October 4th.

A. I couldn't recall the exact words.

"Q. Well, tell us the substance of it as near as you can.

A. As near as I can remember he asked me whether I was ready to make metwurst and I told him yes, I said, Put in the order for 300 pounds and that would be delivered the following Monday. He generally called at my place of business twice a week, Monday and Thursday.

"Q. And you then gave him the order for 300 pounds of Boston butts?

A. Yes sir.

"Q. And you told him you were ready to place the order and you were ready to make some metwurst, is that right?

A. Yes sir."

This affiant further says that at the time of preparing and filing said petition in behalf of plaintiff in said Court of Common Pleas and at the time of the first trial of said [fol. 48] cause, neither plaintiff nor said Nolan Boggs, nor this affiant had any knowledge or information as to the

aforesaid statements so made by the said defendant Burmeister on said second trial.

Percy R. Taylor.

Sworn to before me and subscribed in my presence this 2nd day of March, 1939. John R. Calder, Notary Public, Lucas County, Ohio. My Commission expires October 20, 1939. (Seal.)

[fol. 49] EXHIBIT "K"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4340

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO REMAND CAUSE TO COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO—Filed Mar. 4, 1939

Now comes the plaintiff in the above entitled cause, by her attorneys Nolan Boggs and Percy R. Taylor, and moves the Court to remand said cause to the Court of Common Pleas in and for the County of Lucas and State of Ohio, on the ground that this Court is without jurisdiction to hear and determine the cause and is without jurisdiction of either of the parties to or the subject matter of this suit for the reasons following:

1. Said cause of action was improperly and unlawfully removed from said Court of Common Pleas to said United States District Court.

2. This is a suit to recover on a tort in which the actual facts, as shown upon the trial of said cause in the Court of Common Pleas of Lucas County, Ohio, are that defendants Armour & Company and Charles J. Burmeister are jointly liable to plaintiff. The facts constituting such joint negligence were not pleaded in plaintiff's petition filed in said court. It further appearing that said defendant Charles J.

Burmeister has at all times been and is now a resident and citizen of the State of Ohio, this Court has no juris-
[fol. 50] diction over this cause, and defendant Armour & Company is not entitled to remove this cause to this court.

In support of the foregoing motion, the plaintiff hereby refers to the affidavit hereto attached and made a part hereof marked "Exhibit A."

Nolan Boggs and Percy R. Taylor, Attorneys for Plaintiff.

For brief in support of the above motion, reference is respectfully made to brief in behalf of plaintiff filed in support of like motion in Case No. 4339.

Percy R. Taylor, of Counsel for Plaintiff.

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, copies of this motion and of the brief in support of the same have been delivered to Welles, Kelsey, Cobourn & Harrington, 807 Ohio Building, Toledo, Ohio, attorneys for defendant Armour & Company, and to Wm. F. Miller, 511 Edison Building, attorney for defendant Charles J. Burmeister, this 3rd day of March, 1939.

Percy R. Taylor, Attorneys for Marie Kniess.

[fol. 51] EXHIBIT "K-1"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4340

MARIE KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

AFFIDAVIT

STATE OF OHIO,
County of Lucas, ss:

Percy R. Taylor, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff Marie Kniess in the above entitled cause, and has been such attorney since the filing of said suit in the Court of Common Pleas of

Lucas County, Ohio, in which court its docket number was 142031.

Affiant further says that on the second and last trial of said cause in said Court of Common Pleas, the defendant Charles J. Burmeister, on cross-examination by Nolan Boggs, one of the attorneys of plaintiff, testified, as follows, as appears on pages 16 and 17 of the Bill of Exceptions taken on the trial of said cause and pages 45 to 59 inclusive, of the printed record of said cause filed in the Supreme Court of the State of Ohio:

"Q. Mr. Burmeister, calling your attention to 1934, did you make any purchase in the month of October of that year from Armour & Company of what is known in the trade as Boston butts?

A. Yes sir.

[fol. 52] "Q. Can you recall when you made your first purchase of Boston butts, from them?

A. Yes, they were delivered in October, on the 8th, I think, on a Monday, but they were ordered several days before that.

"Q. And how did you order them and from whom did you order them?

A. Well, they asked me several weeks before whether I needed some butts for making metwurst and I told them——

"Q. Who asked you?

A. Ed Hauptman, the salesman.

"Q. What did he say?

A. He asked whether I needed some butts for making metwurst.

"Q. That is several weeks before October 4th?

A. Yes sir.

"Q. What did you tell him?

A. I told him I wasn't ready, the weather was too warm.

"Q. What if anything happened after that about ordering butts from Armour & Company?

A. I didn't understand the question. (Question withdrawn.)

"Q. Who is Mr. Ed. Hauptman, if you know?

A. He is salesman for Armour & Company that called on me.

"Q. On this occasion did he call on you or phone you?

A. No, he called on me but later on there was another salesman in the house that called me up and asked me about it.

"Q. Now I am referring to the fall of 1934, in October.

A. Yes sir.

"Q. And you placed your order on October 4th, is that correct, with Armour & Company.

A. Yes sir.

"Q. For how many Boston butts, what quantity.

A. About 300 pounds.

"Q. And you say some two weeks before that is when Mr. Ed Hauptman of Armour & Company called on you and wanted to know if you were ready for Boston butts to make metwurst?

A. I wouldn't say it was Hauptman or the man at the house, but they asked me about it.

"Q. Who was the other man?

A. George Gradel.

"Q. It was either Mr. Hauptman or George Gradel that called you and wanted to know if you were ready to make metwurst?

A. Yes sir.

[fol. 53] "Q. And that was about two weeks prior to October 4th, 1934?

A. That is right.

"Q. And they also wanted to know whether or not you were ready for Boston butts, is that right?

A. Yes sir.

"Q. Then later on did Mr. Hauptman call at your place of business and you gave him this order, or did you give it to him on the telephone?

A. He called at the place of business.

"Q. And you gave him the order for the Boston butts, 300 pounds, on October 4th, 1934?

A. Yes.

"Q. And you say they were delivered to you on Monday, October 8th?

A. The following Monday, yes sir.

"Q. Now Mr. Burmeister, when you gave this order to Mr. Hauptman on October 4th, I wish you would tell the jury just what was said by Mr. Hauptman to you or by you to Mr. Hauptman about these Boston butts and the making of metwurst at that time on October 4th.

A. I couldn't recall the exact words.

"Q. Well, tell us the substance of it as near as you can.

A. As near as I can remember he asked me whether

I was ready to make metwurst and I told him yes, I said, Put in the order for 300 pounds and that would be delivered the following Monday. He generally called at my place of business twice a week, Monday and Thursday.

"Q. And you then gave him the order for 300 pounds of Boston butts?

A. Yes sir.

"Q. And you told him you were ready to place the order and you were ready to make some metwurst, is that right.

A. Yes sir."

This affiant further says that at the time of preparing and filing said petition in behalf of plaintiff in said Court of Common Pleas and at the time of the first trial of said cause, neither plaintiff nor said Nolan Boggs, nor this affiant had any knowledge or information as to the aforesaid [fol. 54] statements so made by the said defendant Burmeister on said second trial.

Percy R. Taylor.

Sworn to before me and subscribed in my presence this 3rd day of March, 1939. Ray M. Beckwith, Notary Public, Lucas County, Ohio. My Commission expires Aug. 11, 1939. (Seal.)

[fol. 55] EXHIBIT "L"

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 4338. Civil

GEORGE E. KNIESS

vs.

ARMOUR & COMPANY et al.

No. 4339. Civil

LOUISA F. MEINECKE

vs.

ARMOUR & COMPANY et al.

No. 4340. Civil

MARIE KNIESS

vs.

ARMOUR & COMPANY et al.

No. 4341. Civil

HERBERT O. SCHWALBE

vs.

ARMOUR & COMPANY et al.

No. 4342. Civil

MAYBELLE SHWALBE

vs.

ARMOUR & COMPANY et al.

Toledo, Ohio, April 1, 1939.

NOTICE OF RULING OF COURT ON MOTION TO REMAND

"Motion to remand sustained in each case—#4338, 4339, 4340, 4341, 4342.

Frank L. Kloeb, U. S. District Judge."

NOTE. An order has been entered accordingly by the Clerk.

To: Percy R. Taylor, 740 Spitzer Bldg., Toledo, Ohio; Nolan Boggs, 826 Nicholas Bldg., Toledo, Ohio, Attorneys for Plaintiffs.

To: Edward W. Kelsey, Jr., 807 Ohio Bldg., Toledo, Ohio; William F. Miller, 511 Edison Bldg., Toledo, Ohio, Attorneys for Defendants.

Very respectfully, C. B. Watkins, Clerk, by George H. Blossom, Deputy Clerk.

[fol. 56] EXHIBIT "M"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Civil Action File No. 4338

GEORGE E. KNIESS, Plaintiff,

vs.

ARMOUR & COMPANY and CHARLES J. BURMEISTER, Defendants

MOTION TO VACATE AND SET ASIDE ORDER OF REMAND—Filed April 22nd, 1939

Now comes the defendant, Armour & Company, by its attorneys, Welles, Kelsey, Cobourn & Harrington, and moves the court for an order setting aside and vacating the purported order of remand made in this cause on April 1, 1939, and in support of this motion respectfully shows the court:

1. As more fully appears from the record of the Court of Common Pleas of Lucas County, Ohio, heretofore filed in this cause, within the time allowed by law, this defendant filed in said Court of Common Pleas:

(a) Petition for removal to the District Court of the United States;

(b) Notice of filing the same;

[fol. 57] (c) Bond on removal; and

(d) Motion for removal.

2. Thereafter the plaintiff requested and received a hearing in the Court of Common Pleas of Lucas County, Ohio, on the petition for removal, and said Court, after a full hearing, denied said petition and signed a certain journal entry to that effect. A certified copy of said journal entry is included in the record heretofore filed in this court.

3. On March 10, 1936, defendant, Armour & Company, filed in the Common Pleas Court of Lucas County, Ohio, a motion to reconsider the petition for removal. A certified copy of said motion is included in the record heretofore filed in this cause.

4. On March 14, 1936, said Common Pleas Court of Lucas County, Ohio, after a full hearing accorded all parties,

denied said motion to reconsider the petition for removal, and entered a journal entry to that effect. A certified copy of said journal entry is included in the record heretofore filed in this cause.

5. Thereafter this cause proceeded to trial, and on November 30, 1938, the Supreme Court of Ohio rendered its [fol. 58] decision in this cause (reported in 134 O. S. 432), the court holding in the syllabi:

"Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (Canton Provision Co. v. Gauder, 130 Ohio St., 43, approved and followed.)"

6. Thereafter the said George E. Kniess filed in the Supreme Court of Ohio an application for a rehearing, which application was on January 25, 1939, denied.

7. On January 26, 1939, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County, Ohio. A certified copy of said mandate appears in the record heretofore filed in this cause.

8. On February 10, 1939, pursuant to the mandate of the Supreme Court of Ohio, the Common Pleas Court of Lucas County, Ohio, set aside the prior order denying the petition and order for removal and set aside the prior order denying [fol. 59] the motion to reconsider said petition for removal, and ordered this cause removed to the District Court of the United States for the Northern District of Ohio, Western Division. A certified copy of said journal entry appears in the record heretofore filed in this cause.

9. Pursuant to said journal entry, a transcript of the record in the Court of Common Pleas of Lucas County, Ohio, certified as required by law, was filed on February 17, 1939, in the District Court of the United States for the Northern District of Ohio, Western Division, and docketed as this cause.

10. On February 20, 1939, pursuant to the Federal Rules of civil procedure, defendant, Armour & Company, filed a separate answer in this cause.

11. On February 22, 1939, a certain stipulation was filed in this cause, permitting the plaintiff to file an amended complaint without prejudice to the rights of the defendant to move to strike any new matter, said stipulation further providing that the defendants' answers should stand as answers to the amended complaint.

12. On February 22, 1939, the plaintiff filed an amended complaint in this cause.

[fol. 60] 13. On March 1, 1939, defendant, Charles J. Burmeister, filed his separate answer in this cause.

14. On March 3, 1939, the plaintiff herein filed a motion to remand this cause.

15. On March 16, 1939, defendant, Armour & Company, filed in said District Court in this cause a motion, pursuant to Judicial Code Section 274 (28 U. S. C. A. Sec. 399) to amend the petition for removal to correctly state the facts, in the event it was ascertained that the plaintiff was a citizen and subject of Germany, as he claimed in his motion to remand.

16. On April 1, 1939, this court entered a certain purported order in this cause, sustaining the motion to remand, and ordering the cause remanded. This court did not render any opinion on the motion to remand. As stated in a brief filed by the plaintiff in the Supreme Court of Ohio on April 17, 1939:

"* * * the Federal Court must have examined and in fact did examine, the facts of each case and reached the conclusion that no separable controversy was really presented."

17. The purported order of remand entered by this court necessarily holds that a separable controversy was not presented on the record in this cause, and in the opinion of [fol. 61] counsel for defendant, Armour & Company, purports to exercise jurisdiction that this court does not possess, i. e., a jurisdiction to review and reverse the decision and order of the Supreme Court of Ohio and the orders of the Court of Common Pleas of Lucas County, Ohio, which

decision and orders are conclusive on all courts, including said United States District Court, subject to such review by appeal or error as may exist in the Appellate Courts of Ohio and the Supreme Court of the United States.

18. In the opinion of counsel for defendant, Armour & Company, the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, have full and complete jurisdiction to determine whether or not the plaintiff's petition in these causes stated a joint cause of action against Armour & Company and Charles J. Burmeister, the other defendant. In fact, it has been uniformly held that that question is determined exclusively by the laws of Ohio on that subject as construed by the courts of Ohio.

19. In the opinion of counsel for defendant, Armour & Company, the plaintiff, George E. Kniess, sought, and after a full hearing, secured the opinion, decision and judgment of the Supreme Court of Ohio, and the opinion, decision and judgment of the Court of Common Pleas of Lucas County, [fol. 62] Ohio, on that precise question, and said opinions, decisions and judgments are, as between the parties to this cause, res adjudicata and final.

20. In the opinion of counsel for the defendant, Armour & Company, this court is required by 28 U. S. C. A. 687 (R. S. 905) to give full faith and credit to the opinions, decisions and judgments entered in this cause, after full hearings accorded all parties in interest, by the Supreme Court of Ohio and by the Court of Common Pleas of Lucas County, Ohio.

21. In the opinion of counsel for defendant, Armour & Company, said motion to remand did not and could not present any question for determination to this court that had not theretofore been presented to and finally and conclusively determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio.

22. In the opinion of counsel for defendant, Armour & Company, said order of remand in this cause further denied the defendant, Armour & Company, the right to amend the petition for removal, as requested in said defendant's motion therefor, pursuant to Judicial Code Section 274c (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

[fol. 63] 23. In the opinion of counsel for defendant, Armour & Company, the amended complaint filed by the plaintiff herein and the stipulation in regard thereto waived any defects in the removal proceedings, which defects, if in fact they exist, were but formal and modal, and the filing of said amended petition and said stipulation was a stipulation to the jurisdiction of this court and a consent to the removal proceedings, for which further reason the plaintiff in this cause is estopped to question the jurisdiction of this court.

24. In the opinion of counsel for defendant, Armour & Company, this court in purporting to remand this cause has transcended the jurisdiction of this court and undertaken to exercise powers not vested in this court by any law of the United States.

(S.) Welles, Kelsey, Cobourn & Harrington, (S.) Edward W. Kelsey, Jr., (S.) Fred A. Smith, Attorneys for Armour & Company, Address: 807 Ohio Building, Toledo, Ohio.

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, copies of this motion have been delivered to Nolan [fols. 64-65] Boggs, 826 Nicholas Building, Toledo, Ohio, and Percy R. Taylor, 740 Spitzer Building, Toledo, Ohio, attorneys for plaintiff, this 22nd day of April, 1939.

(S.) Welles, Kelsey, Cobourn & Harrington, (S.) Edward W. Kelsey, Jr., (S.) Fred A. Smith, Attorneys for Armour & Company.

[fols. 66-70] [File endorsement omitted]

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Title omitted]

Memorandum in Support of Motion for Leave to File Petition for Writ of Mandamus—Filed July 7, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

PRELIMINARY STATEMENT

Five individuals (hereinafter referred to as Kneiss, et al., instituted separate suits in the Court of Common Pleas of Lucas County, Ohio against petitioner, Armour and Com-

pany, and Charles J. Burmeister as defendants. Each plaintiff is represented by the same counsel and the pleadings in each case are in all material respects identical.

The petitions of Kniess, et al., claim that Armour & Company, a non-resident foreign corporation, sold certain fresh pork to Burmeister, a Toledo grocer. It was further claimed that Burmeister took the fresh pork and ground it up into a smoked sausage known as "mettwurst", which was "a food product ready to be eaten without cooking or further treatment".

Kniess, et al., claimed to have purchased some of this [fol. 72] smoked sausage from Burmeister and, as a result of eating it, claim to have acquired a parasitic disease known as "Trichinosis", which is caused by eating improperly cooked or cured pork.

Within the time allowed by law, Armour & Company filed a petition and bond for removal to the District Court of the United States, for the Northern District of Ohio, Western Division, on the grounds that the plaintiff's claim, if any, against Armour & Company was separate and distinct from their claim against the resident defendant, Burmeister.

A full hearing was had in the Court of Common Pleas as to whether or not these causes were removable, and that court originally held that they were not. The Common Pleas Court also held the cases were not removable in passing on a motion to reconsider the question filed subsequent to the decision of the Supreme Court of Ohio, in the case of Canton Provision Company v. Gauder, 130 O. S. 43.

Thereafter substantially identical pleadings were filed in all causes, Armour & Company preserving an exception to the rulings of the Court of Common Pleas on the petition for removal, and by agreement of all parties, the George E. Kniess case proceeded to trial as a "test case", and the other cases were permitted to remain pending in the Court of Common Pleas.

After two trials, the Supreme Court of Ohio sustained an appeal as of right and granted a motion to certify in the George E. Kniess case. In an opinion handed down by the [fol. 73] Supreme Court of Ohio on November 30, 1938, and reported in 134 O. S. 432, the Supreme Court of Ohio held:

"Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists be-

tween the resident plaintiff and the non-resident defendant." (Syl. 1.)

"In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tortfeasors." (Syl. 2.)

In the course of the opinion, the Supreme Court concluded:

"As the allegations of the petition stand it can hardly be said that the liability of Armour & Company would be the same when the pork was sold in metwurst as it would be if Burmeister had sold the Boston butts over the counter in the same form as he received them from Armour & Company. In either instance, however, the liability of Armour & Company was primary and that of Burmeister secondary. There was no privity of contract between Kniess and Armour & Company as there was between Kniess and Burmeister. Differing in degree, and differing in nature, the liability of Armour & Company and Burmeister cannot be joint. Their alleged torts were different in character and kind, and were not concurrent. Morris v. Woodburn, 57 Ohio St., 330, 48 N. E., 1097, Village of Mineral City v. Gilbow, 81 Ohio St., 263, 90 N. E. 800.

"For the reasons stated we are constrained to hold that a separable controversy did exist between the plaintiff Kniess, and Armour & Company. The defendant, Armour & Company, adequately preserved its exceptions to the ruling of the court denying the petition for removal. * * * For the reasons stated the trial court erred, and the cause is therefore reversed and remanded to the Court of Common Pleas with instructions to grant the petition of Armour & Company to remove the cause to the District Court of the United States." (Pp. 444, 445.)

[fol. 74] Pursuant to the mandate of the Supreme Court of Ohio in the George E. Kniess case, returned to the Court of Common Pleas of Lucas County, Ohio on January 26, 1939, the Court of Common Pleas set aside and vacated its previous orders denying the petition for removal, approved the bond, and ordered all five cases removed to the District Court of the United States.

Thereafter the plaintiffs in the District Court filed motions to remand, claiming that while the pleadings did not show any joint claim against the two defendants, that the "facts" would show such a joint claim. Upon that basis the District Court accordingly ordered all five of these cases remanded to the Common Pleas Court of Lucas County, and disregarded the petitioner's claim that the District Court could not properly consider any matters that were not presented to the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, and that such consideration was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting res judicata.

CONTENTIONS OF PETITIONER

The contentions of the petitioner, which will be discussed in the order listed below, are briefly as follows:

1. The United States District Court erred in entering an order of remand in these causes and in refusing to vacate said order of remand for the reason that

[fol. 75] (a) The Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio has full jurisdiction to determine whether or not the plaintiff had properly joined petitioner and the resident defendant. (See paragraph No. 21 of petition for writ of mandamus.)

(b) Whether or not petitioner and the resident defendant were properly joined is determined exclusively by the law of Ohio. (See paragraph No. 21 of petition for writ of mandamus.)

(c) The power of the District Court to pass upon the question of whether or not the petitioner and the resident defendant were properly joined was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting res judicata. (See paragraphs No. 20 to 23 inclusive of petition for writ of mandamus.)

(d) In determining whether or not the plaintiff properly joined petitioner and the resident defendant, the District Court could not properly consider any matters that were not presented to and considered by the Supreme Court of

Ohio and the Court of Common Pleas of Lucas County, Ohio. (See paragraph No. 24 of petition for writ of mandamus.)

2. The erroneous orders of remand entered by the District Court are not reviewable by appeal or error, and a writ of mandamus is a proper method of correcting the error. (See paragraphs Nos. 25 to 30 inclusive of petition for writ of mandamus.)

[fol. 76] ARGUMENT AND LAW

1. The United States District Court Erred in Entering an Order of Remand in these causes and in Refusing to Vacate said Order of Remand for the reason that—

(a) The Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, had full Jurisdiction to Determine whether or not the Plaintiff had properly Joined Petitioner and the Resident Defendant. (See paragraph No. 21 of petition for writ of mandamus.)

This point is admitted by counsel for Kniess, et al. On page 18 of the brief of George E. Kniess, filed in the Supreme Court of Ohio, opposing the motion of Armour & Company to certify record, etc., it is stated:

"No question is made but that Armour & Company presented a petition for removal of this suit as against it, together with a sufficient bond, to the Court of Common Pleas, within the statutory period for so doing.

"It is, however, well settled that the court to which such a petition is presented has jurisdiction, in the first instance, to examine the petition for removal of the cause, and to deny such removal if it shall appear that the petitioner is not entitled thereto.

Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. Ed. 1159.
Powers v. C. & O. R. Co., 65 Fed. 129, affirmed 169 U. S. 92, 42 L. Ed. 673.
Missouri K. & T. R. Co. v. Chappell, 206 Fed. 688.
Miller v. Soule, 221 Fed. 493.

* * * * * * *

[fol. 77] "In determining whether a separable controversy exists entitling a defendant to remove the action against it to the federal court, the state court has before it 'a pure

question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit.'

Cyclopedia of Federal Procedure, Vol. II, Page 177.
Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 30 L. Ed. 1159."

(b) Whether or not the Petitioner and the Resident Defendant were Properly Joined is Determined Exclusively by the Law of Ohio. (See paragraph No. 21 of petition for writ of mandamus).

This point is likewise admitted in the said brief of George E. Kniess filed in the Supreme Court of Ohio, as it is stated at pages 22 and 24 of said brief.

"Furthermore, 'the right to join defendants in the state court, and the question whether the petition or complaint states a joint cause of action against them, are to be determined according to the law of the state where the action was brought, and not according to the Federal law.'

"54 C. J., Page 293.

* * * * * * *

"The state law determines the right to join defendants in the state court whether the petition states a joint cause of action against them, on the question of removal to the federal court as a separable controversy.

[fol. 78] "C. & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. Ed., 121;
Hancock v. Railroad Co., 28 Fed. (2d) 45;
Stephens v. Southern Pacific Co., 16 Fed. (2d) 288."

The correct rule was recognized and stated by the Supreme Court of Ohio in its opinion in the Kniess case

"It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one. Cincinnati, N. O. & T. P. Rd. Co. v. Bohon, 200 U. S., 221, 50 L. Ed., 448, 26 S. Ct., 166; Chicago & Alton Ry. Co. v. McWhirt, 243 U. S. 422, 61 L. Ed., 826, 37 S. Ct. 392; Chicago, Rock Island & Pacific Ry. v. Dowell, 229 U. S. 102, 57 L. Ed., 1090, 33 S. Ct., 684; Norwalk,

Admx., v. Air-Way Electric Appliance Corp., 87 F. (2d) 317, 110 A. L. R., 183, and see annotation at page 191." (P. 437.)

Kniess v. Armour, 134 O. S. 432."

(c) The Power of the District Court to pass upon the Question of whether or not the Petitioner and the Resident Defendant were Properly Joined was Barred by the Proceedings taken in the State Courts which Ripened into a Final Judgment Constitutes res judicata. (See paragraphs No. 20 to 23 Inc. of petition for writ of mandamus.)

It is the contention of petitioner that Kniess et al. had a right to litigate the question as to whether or not the petitioner and Burmiester were properly joined, either in the state court or in the Federal Court. Kniess, et al., had they desired to do so, could have permitted the Common [fol. 79] Pleas Court to issue an ex parte order of removal. On the other hand, Kniess, et al. could, and in this instance, did, request and receive a hearing on that question in the Court of Common Pleas and in the Court of Appeals of Lucas County, Ohio and in the Supreme Court of Ohio.

Armour & Company, by remaining in the state court, likewise waived any right it had to secure, by filing a proper transcript in the District Court without awaiting the action of the state court, an original determination of that question by the District Court of the United States.

It is the contention of petitioner that an adequate state remedy was available to Kniess, et al., and having invoked that and pursued it to final judgment, Kniess, et al. cannot escape the effect of that adjudication.

We believe this principle was fully discussed and settled in the case of American Surety Company v. Baldwin, 287 U. S. 156. In this case a state court entered a judgment against a surety company without notice to it in violation of the due process clause of the Fourteenth Amendment. The surety company appeared in the State Court and made a motion to vacate the judgment. The State Court held that it had jurisdiction to enter the judgment, whereupon the surety company filed suit in the Federal Court for an injunction, claiming that the action in the State Court deprived it of due process of law. In holding that the decision of the State Court on the motion to vacate was final

[fol. 80] and res judicata, the Supreme Court of the United States, in the opinion by Mr. Justice Brandeis, said:

"The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 175 U. S. 555. And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814. But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there. Compare Mitchell v. First National Bank, 180 U. S. 471, 480-481; Lion Bonding Co. v. Karatz, 262 U. S. 77, 90.

"The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general appearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare Napa Valley Elec. Co. v. Railroad Commn., 251 U. S. 366; Grubb v. Public Utilities Commn., 281 U. S. 470, 477-478. * * * With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Company asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the [fol. 81] fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

"The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a

state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, § 2; Rev. Stat. §905; Mills v. Duryee, 7 Cranch 481, 485; Insurance Co. v. Harris, 97 U. S. 331, 336. Compare Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 155. The principles of res judicata apply to questions of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Assn., 283 U. S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See Marshall v. Holmes, 141 U. S. 589, 596; Fidelity & Deposit Co. v. Gaston, Williams & Wigmore, 13 F. (2d) 267, aff'd per curiam, id., 268. The principles of res judicata may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, res judicata, and precludes a suit to enjoin enforcement of the judgment. Bernhard v. Idaho Bank & Trust Co., 21 Idaho 598; 123 Pac. 481. Since the decision would formally constitute res judicata in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction *might have been presented to the state Supreme Court and reviewed here,* the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Cf. Fidelity Nat. Bank & Trust Co. v. Swope, 274 U. S. 123, 130-131." (PP. 164, 165, 166, 167.) (Italics ours.)

[fol. 82] To the same effect is Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522. In this case a suit was instituted in the Missouri State Court and removed to the District Court, whereupon the defendant appeared specially and moved to quash and dismiss for want of service. After the hearing, the motion was overruled with leave to plead within thirty days. No plea having been filed, the cause proceeded to judgment. Thereafter, the plaintiff brought suit on the judgment in the District Court for Iowa, and the defendant set up as a defense that it had not been served on the Missouri judgment, and hence the judgment was invalid, etc. The plaintiff objected to proof of such matters, claiming that the judgment on the motion

in the first case was res judicata. In holding that the first judgment was res judicata, the Supreme Court in the opinion by Mr. Justice Roberts said:

"The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits. Harkness v. Hyde, 98 U. S. 476; Goldey v. Morning News, 156 U. S. 518; Toledo Rys. & Lt. Co. v. Hill, 244 U. S. 49; Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229; Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405. The special appearance gives point to the fact that the respondent entered the Missouri court for the [fol. 83] very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. Thompson v. Whitman, 18 Wall. 457; Pennoyer v. Neff, 95 U. S. 714; Hart v. Sansom, 110 U. S. 151; Wetmore v. Karrick, 205 U. S. 141; Bigelow v. Old Dominion Copper Co., 225 U. S. 111; McDonald v. Mabee, 243 U. S. 90. It had also the right to appeal from the decision of the Missouri District Court as is shown by Harkness v. Hyde, supra, and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud,

be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

"While this Court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. Phelps v. Mutual Life Assn., 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; Moch v. Insurance Co., 10 Fed. 696; Thomas v. Virden, 160 Fed. 418; Chinn v. Foster-Milburn Co., 195 Fed. 158. And we are in accord with this view." (Pp. 524, 525, 526.)

From the foregoing cases and authorities, we submit that [fol. 84] it is well settled that the principles of res judicata apply to question of jurisdiction, as well as to other issues. An adequate state remedy being available, Kniess, et al., having invoked and pursued it to final judgment, cannot escape the effect of the final adjudication by the state courts. Since the issue was presented to and determined by the state courts, and might have been reviewed by the Supreme Court of the United States, the decision of the state courts was a bar to any re-examination of that question by the district court.

We earnestly submit that the authorities heretofore set forth in sub-paragraphs (a), (b) and (c) conclusively support the allegations contained in Paragraphs 20, 21, 22 and 23 of our petition. Whether the defendants are properly joined must be determined by the laws of Ohio. Kniess, et al. do not challenge that statement. The decision by the Supreme Court of Ohio, therefore, is res adjudicata and final. Consequently, no judicial question was presented to the District Court for its decision or discretion and its assumed determination was an unwarranted appellate review of the decision of the Supreme Court of Ohio. The judicial power to review that decision rests with the Supreme Court of the United States and not with the United States District Court for the Northern District of Ohio.

[fol. 85] (d) In determining whether or not the plaintiff properly joined Petitioner and the Resident Defendant, the District Court could not properly consider any matters that were not presented to and considered by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio. (See paragraph No. 24 of petition for writ of mandamus).

Kniess, et al. have contended that while the State Court is limited to an examination of the pleadings as they stood at the time the petition for removal was filed, in determining whether or not the plaintiffs had stated a joint cause of action against petitioner and Burmeister, the Federal Court has broader powers. It is the contention of Kniess that the Federal Court considered the "facts" to see if it is possible or probable that the "facts" will show a joint cause of action.

[fol. 86] In the first place we do not believe there were any "facts" presented to the Federal Court for consideration, but be that as it may, it is well settled by numerous cases decided by the Supreme Court of the United States that the District Court in considering whether or not a joint cause of action was stated against petitioner and Burmeister, was limited to a consideration of the pleadings on file at the time the petition for removal was filed, exactly in the same manner as the State Court.

The most recent case discussing that question is Pullman Co. v. Jenkins (decided January 16, 1939), 305 U. S. 534. This case was removed from the State Court and a motion to remand was denied by the District Court. The Circuit Court of Appeals reversed the District Court. In passing upon the action of the lower courts, the Supreme Court of the United States in an opinion by Chief Justice Hughes said:

"On appeal, the Circuit Court of Appeals, passing the other questions, held that if it did not sufficiently appear at the time of the petition for removal that the cause was not separable, it did so appear when the second amended complaint was filed and hence that the District Court erred in denying the motion to remand. 96 F. 2d p. 410. This ruling was placed upon an erroneous ground. *The second amended complaint should not have been considered in determining the right to remove,* which in a case like the present one *was to be determined according to the plaintiffs' pleading at the time of the petition for removal.* Barney v. Latham, 103 U. S. 205, 213-216; Graves v. Corbin, 132 U. S. 571, 585; Louisville & Nashville R. Co. v. Wangelin, 132 U. S. 599, 601; Salem Trust Co. v. Manufacturers' Finance Co., 264 U. S. 182, 189, 190; Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 294, 295." (pp. 537, 538) (Italics ours).

[fol. 87] The correct rule was recognized and properly stated in the prior opinion of the Supreme Court of Ohio in the Kniess Case as follows:

"After considerable uncertainty the courts finally held that the question of removal must be determined from the record at the time the petition for removal is filed. Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 50 L. Ed. 441, 26 St. Ct., 161; Southern Ry. Co. v. Miller, 217 U. S. 209, 54 L. Ed. 732, 30 S. Ct. 450. While this rule has been subject to severe criticism by both writers and judges (88 Central Law Journal, 246; Louisville & Nashville Rd. Co. v. Western Union Telegraph Co., 218 F., 81, 93; Hagerla v. Mississippi River Power Co., 202 F., 771, 773), it is settled today that the determination of the nature of the controversy must be decided solely upon the allegations contained in the petition. Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. Ed. 1122, 23 S. Ct., 807; Fraser v. Jennison, 106 U. S., 191, 27 L. Ed., 131, 1 S. Ct., 171; Moloney v. Cressler, 210 F., 104." (P. 436, 437) Kniess v. Armour & Co., 134 O. S. 432.

We state without fear of contradiction that there is not a single case or authority to the effect that the District Court has any power to consider the "facts" or, in fact, to [fol. 88] consider anything except the pleadings on file at the time the petition for removal was filed in determining whether or not a joint cause of action was stated. To repeat, there is no authority whatever for the position taken by the District Court in this cause.

From the foregoing cases and authorities it is obvious that the Federal Court, in considering whether or not the defendants had been properly joined or whether or not a joint cause of action was stated against them, could only pass upon the precise matter which had previously been determined by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio. The erroneous belief of the District Court that it had greater powers in passing upon the question does not alter the fact that it has in effect refused to give full faith and credit to the opinion, decision and judgment of the state courts. We submit that the purported action of the District Court is an attempted exercise of a jurisdiction that is not vested in said court by any law of the United States.

[fol. 89] 2. The Erroneous Orders of Remand entered by the District Court are not Reviewable by Appeal or Error, and a Writ of Mandamus is a Proper Method of Correcting the Error. (See paragraphs No. 25 to 30, inclusive, of petition for writ of mandamus.)

The removal statute, 28 U. S. C. A. 71 (Judicial Code Section 28 Amended) provides in part:

"* * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. * * *"

28 U. S. C. A. Section 80 (Judicial Code Section 37) provides in part:

"If in any suit * * * removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said District Court shall proceed no further therein, but shall * * * remand it to the court from which it was removed. * * *"

It will be noted that there is no provision in Section 80 stating that an order of remand made under that Section "shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed." (Sec. 71)

[fol. 90] As a result, the Fourth Circuit Court of Appeals (Travelers Protective Association v. Smith (1934) 71 Fed. (2d) 511) and the Third Circuit Court of Appeals (Bank of Securities Corp. v. Insurance Equities Corp., (1936) 85 Fed. (2d) 856), have held that where the District Court has improperly made an order of remand under Section 80, a review is permissible in the Circuit Court of Appeals.

However, in a very recent case (Employers Corporation v. Bryant (decided January 4, 1937) 299 U. S. 374, the court

pointed out that Sections 71 and 80 are in pari materia, and should be construed together, and when so construed, prevents a review of all orders of remand by the District Court. The opinion by Judge VanDevanter in the Bryant case reviews the right to a writ of mandamus to review an erroneous order of remand under the various removal statutes in force from time to time, and succinctly states the law on the question as follows:

"1. For a long period an order of a federal court remanding a cause to the state court whence it had been removed could not be reexamined on writ of error or appeal, because not a final judgment or decree in the sense of the controlling statute. But in occasional instances such an order was reexamined in effect on petition for mandamus, and this on the theory that the order, if erroneous, amounted to a wrongful refusal to proceed with the cause and that in the absence of other adequate remedy mandamus was appropriate to compel the inferior court to exercise its authority.

"By the Act of March 3, 1875, c. 137, 18 Stat. 472, deal-[fol. 91] ing with the jurisdiction of the circuit (now district) courts, Congress provided, in § 5, that if a circuit court should be satisfied at any time during the pendency of a suit brought therein, or removed thereto from a state court, that 'such suit does not really or substantially involve a dispute or controversy properly within' its 'jurisdiction,' the court should proceed no further therein, but should 'dismiss the suit or remand it to the court from which it was removed, as justice may require.' Thus far this section did little more than to make mandatory a practice theretofore largely followed, but sometimes neglected, in the circuit courts. But the section also contained a concluding paragraph, wholly new, providing that the order 'dismissing or remanding the said cause to the state court' should be reviewable on writ of error or appeal. This provision for an appellate review continued in force until it was expressly repealed by the Act of March 3, 1887, c. 373, § 6, 24 Stat. 552, which also provided that an order remanding a cause to a state court should be 'immediately carried into execution' and 'no appeal or writ of error' from the order should be allowed.

"The question soon arose whether the provisions just noticed in the Act of March 3, 1887, should be taken broadly

as excluding remanding orders from all appellate review, regardless of how invoked, or only as forbidding their review on writ of error or appeal. The question was considered and answered by this Court in several cases, the uniform ruling being that the provisions should be construed and applied broadly as prohibiting appellate reexamination of such an order, where made by a circuit (now district) court, regardless of the mode in which the reexamination is sought. A leading case on the subject is In re Pennsylvania Co., 137 U. S. 451, which dealt with a petition for mandamus requiring the judges of a circuit court to reinstate, try and adjudicate a suit which they, in the circuit court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this Court [fol. 92] said (p. 454):

" 'In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of §§ 71 and 80, Title 28, U. S. Code. They are in pari materia, are to be construed accordingly rather

than as distinct enactments, and, when so construed, show, as was held in Morey v. Lockhart, 123 U. S. 56, 58, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter." (P. P. 378, 379, 380, 381.)

[fol. 93] As pointed out in the foregoing opinion, it is well settled—

(a) An order of remand is not reviewable by appeal or error.

(b) That the usual order of remand following an original determination of the question by the Federal Court is not reviewable by way of a writ of mandamus.

It is the contention of Armour & Company in the instant case that the action of the District Court goes beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the State courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the State courts. 28 U. S. S. C. Section 687 provides in part that—

"The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court of the United States as they have by law or usage from the courts of the state in which they are taken."

As pointed out in a prior part of this memorandum, a judgment in the courts of a state is conclusive in the Federal Courts between the parties, whether the question determined was one of Federal, general or local law, even though [fol. 94] the State courts may have decided a jurisdictional question erroneously? American Surety Company v. Baldwin, supra.

After an extended search, we have been unable to find any case precisely identical with our case, where the courts have either granted or refused a writ of mandamus to compel a District Court to set aside an order of remand, on the ground that the matter had been previously passed upon and decided by the State courts. This is not particularly surprising, as it would be extremely rare for the Federal courts to disregard a decision of the State courts

upon a question where the State law is admittedly conclusive.

However, we have found two cases where the Federal Courts have issued an order of mandamus to the District Courts where the order of remand in the lower courts involved something more than a mere remand of the case.

The leading case on that question is In re Metropolitan Trust Company (1910) 218 U. S. 312. In this case it appeared that a suit had been brought against the Trust Company and others in the State Courts of New York, which suit was thereafter removed to the Federal Court on the ground that there was a separable controversy. The complainant moved to remand the cause, which motion was [fol. 95] denied. After the removal the Trust Company demurred. The United States District Court sustained the demurrer and dismissed the complaint as to the Trust Company. The other defendants then answered, and after a final decree in the defendant's favor was entered, the complainant appealed to the Circuit Court of Appeals, but did not seek a review of the decree dismissing the Trust Company.

The Circuit Court of Appeals decided that there was not a separable controversy and that the motion to remand should have been granted. After the order of remand was entered in the Circuit Court, the complainant moved to vacate the decree and remand the cause as to the Trust Company, which motion the court granted. The Trust Company then applied to the Supreme Court for a writ of prohibition and mandamus. In granting the writ of mandamus, the Supreme Court, in an opinion by Justice Hughes, said:

"* * * After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

"To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable con-

[fol. 96] troversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in In re Pollitz, supra. The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion;' and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force" (pp. 320, 321).

The foregoing case was recently followed in an identical case by the 4th Circuit Court of Appeals, in *Windholz* v. *Everitt* (C. C. A. 4, 1935) 74 Fed. 2d 834.

A case that distinctly states the rule for which we are contending is Wiley vs. Judge of Allegan Court, 29 Mich. 488, at page 495 where the court says:

"• • • The true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law (at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such shape as to give the power judicially thus to determine it) then such determination however erroneous cannot be reviewed. • • • But if the case before the lower court does not, upon its facts or the evidence, legitimately raise the question of law or fact it has assumed to decide, so that the court could act judicially upon it, or so as to give the court the power judicially to make the decision it has assumed to make, then [fol. 97] its action is not properly judicial and no assumed determination of it, nor any order resting upon it, will preclude the remedy by mandamus. • • •".

The foregoing decision is peculiarly appropriate to our case. We contend, as is so clearly pointed out in that case, that the District Court improperly assumed to decide a question that was not, on the record before the District Court, presented to it for determination. In other words, we do not seek a review of the correctness or incorrectness

of the court's decision but claim that the question was not open for decision as it had previously been litigated by the adverse parties and decided by the Supreme Court of Ohio.

In addition to the fact that this question was not before the District Court for the reason that it had been previously decided by the Supreme Court of Ohio and involved a decision on which the Ohio law was controlling, the question was not before the District Court for the further reason that Kniess, et al. had filed amended complaints in the District Court and entered into stipulations (see paragraphs Nos. 13 and 14 of petition for writ of mandamus), thereby waiving any formal defects in the petition for removal. The Supreme Court of the United States has held that such action waives any formal defects. The case we refer to is In re Moore, 209 U. S. 490, the first headnote in this case being as follows:

[fol. 98] "In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court."

As we have pointed out, the question was not presented for determination to the District Court for two reasons. First, the question had previously been determined by the Supreme Court of Ohio, and second, the proceedings taken by Kniess, et al. in filing amended complaints and entering stipulations in the District Court waived any formal defects in the petitions for removal.

In the cases brought by Kniess, et al. against petitioner and Burmeister, the Court of Common Pleas of Lucas County, Ohio is faced with the mandate of the Supreme Court of Ohio ordering these causes removed, and with a conflicting mandate from the District Court purporting to make a second determination and a contradictory order on the same question.

[fol. 99] This situation certainly does not accomplish the objects of the removal statutes "to suppress further prolongation of the controversy". Surely it was never intended that a question should be litigated through the courts of Ohio and finally determined by the Supreme Court of Ohio and that that identical question could then be considered de novo by the District Court and decided by the District Court contrary to the decision of the Supreme Court of

Ohio, particularly when it is admitted that the question involved is determined exclusively by the law of Ohio, as construed by the courts of Ohio.

Conclusion

We do not believe there can be any question whatever but that the District Court erred in remanding the causes referred to, and that the order of the District Court has in effect refused to give full faith and credit to the judgment of the courts of Ohio on a question that is determined exclusively by the law of Ohio.

The question of whether or not the petitioner is wholly without any remedy is concededly debatable, for, as we have stated, we know of no case where the question has arisen or been discussed. By analogy to the cases referred to where an order of remand involved, as it does in our case, something more than a mere original determination of [fol. 100] the question, it would appear that mandamus was the proper remedy. This is particularly true in a case like ours where the court purported to determine a matter that was not presented on the record before the court.

This memorandum is filed pursuant to Rule 33 of the Rules of this court to show "that the application justifies a hearing". We submit that it is apparent "that the application justifies a hearing", and that leave to file should be granted and an order to show cause entered, so that the matter may be fully presented to and considered by the court.

Respectfully submitted, Welles, Kelsey, Cobourn & Harrington, Edward W. Kelsey, Jr., Fred A. Smith, Attorneys for Petitioner.

[fol. 101] In United States Circuit Court of Appeals, Sixth Circuit

Order Granting Leave to File Petition for Writ of Mandamus, etc.—October 12, 1939

The motion for leave to file a petition for a Writ of Mandamus is allowed, and upon the presentation of the petition for such Writ to be directed to the Honorable Frank L. Kloeb, Judge of the United States District Court for the

Northern District of Ohio, Western Division, to show cause why a Writ of Mandamus should not issue, commanding Judge Kloeb to grant petitioner's motion to set aside and vacate the Order of Remand in the case of George E. Kniess v. Petitioner, et al., being No. 4338, Civil on the docket of said court, and four related cases, carrying docket numbers 4339, 4340, 4341, 4342, as appearing in Exhibit L to the petition, and to grant petitioner's motion to amend the petition for removal in the first mentioned case,

It is Hereby Ordered that a copy of the petition, exhibits and a copy of this order be forwarded by the Clerk of this court to the Honorable Frank L. Kloeb, District Judge, in lieu of issuing a rule to show cause, with the request that His Honor, Frank L. Kloeb, reply thereto within twenty (20) days from this date.

[fol. 102] IN UNITE STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

REPLY OF HONORABLE FRANK L. KLOEB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION—Filed October 27, 1939

Comes now Frank L. Kloeb, as Judge of the District Court of the United States for the Northern District of Ohio, Western Division, to whom has been delivered a copy of the order entered October 12, 1939, by this Honorable Court, which order requests a reply, on or before the 1st day of November, 1939, to the petition of Armour and Company for a writ of mandamus commanding him as such Judge to grant petitioner's motion to set aside and vacate the order of remand in the case of George E. Kniess vs. Petitioner, et al., being number 4338, Civil, on the docket of said Court, and four related cases, carrying docket numbers 4339, 4340, 4341 and 4342, and to grant petitioner's motion to amend the petition for removal in said first mentioned case; and makes this his reply as follows:

1. Respondent respectfully says that this Court is without jurisdiction to issue said writ of mandamus, for that said order of remand by this respondent in said causes is a final order from which no appeal may be allowed, pursuant to the provisions of Title 28, Section 71, United States

Code, and said attempted review by mandamus of an order of remand has been expressly forbidden by the Supreme Court of the United States in Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.

[fol. 103] 2. This Court is further without jurisdiction to entertain this suit or issue said writ of mandamus, because its power to issue said writ is limited, by the provisions of Title 28, Section 377, United States Code, to cases in which it has appellate jurisdiction and in aid of such jurisdiction, and this Court has no appellate jurisdiction to review or reverse respondent's orders of remand in said cases because of the express denial of such appellate jurisdiction in Title 28, Section 71, of the United States Code, hereinbefore referred to.

3. Respondent further respectfully points out that, as stated by the Supreme Court of the United States in the case of United States on the relation of Alaska Smokeless Coal Co. vs. Lane, Secretary of the Interior, 250 U. S. 549, on page 555, the writ of mandamus will not issue to control or direct the exercise of discretionary powers such as are involved in the decision by respondent of the several motions to remand these cases against petitioner to the state court.

4. Your respondent respectfully points out that on December 13, 1938, this Court adopted Rule No. 36, reading as follows:

"(a) The Rules of this Court promulgated March 15, 1913, with its amendments are hereby amended so as to harmonize with the 'Rules of Civil Procedure,' adopted by the Supreme Court of the United States pursuant to the Act of Congress of June 19, 1934 (c. 651).

"(b) Any rule of this Court which conflicts with the 'Rules of Civil Procedure' is deemed to be modified or superseded by said 'Rules of Civil Procedure' and the applicable portions of said 'Rules of Civil Procedure' govern."

[fol. 104] Rule 81 (b) of said Rules of Civil Procedure, so adopted by the Supreme Court of the United States, reads as follows:

"The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Wherefore, respondent respectfully suggests that this Court, by reason of its own rule, No. 36 aforesaid, will no longer entertain or consider any petition for a writ of mandamus.

5. In the case of George E. Kniess vs. Petitioner, et al., No. 4338, civil, on the docket of the District Court of the United States for the Northern District of Ohio, Western Division, the motion to remand said cause was supported by an affidavit, the truth of which is not denied, showing the said George E. Kniess at the time of filing said suit in the Court of Common Pleas of Lucas County, Ohio, against Armour & Company, a citizen of the State of Kentucky, and Charles J. Burmeister, a citizen of Ohio, was not, and is not now, a citizen of any state or of the United States, but was and is an alien, and therefore no controversy existed or exists in said cause which is wholly between citizens of different states, as required by Title 28, Section 71, of the United States Code. Said affidavit is set forth as Exhibit J-1, appended to the petition of Armour & Company for this writ of mandamus, and is found on pages 42 to 44, inclusive, of said pleading.

6. The motions to remand filed in each and all of said five causes were supported by affidavits, the truth of which has not been denied, that petitioner, Armour & Company, at the [fol. 105] time it sold the pork product known as Boston butts to defendant, Charles J. Burmeister, knew that said Burmeister intended to and would make the kind of sausage known as metwurst from said meat, from the eating of which metwurst made from diseased pork products so sold by Armour & Company, each of said plaintiffs contracted the disease known as trichinosis; that said Armour & Company solicited said order for metwurst from said Burmeister for that express purpose. Copies of said affidavits filed in the cases of George E. Kniess and Marie Kniess are appended to this petition as Exhibits J-2, page 45, and K-1, page 51, respectively. A like affidavit was filed in each of the other three causes referred to in said petition, as stated on page 9, paragraph 16, of said petition.

The facts stated in said affidavits were not pleaded in said five respective petitions, and said affidavits further declared that said facts were not known to said plaintiffs at the time said petitions were filed, but were first learned on the second

trial of the case of George E. Kniess, No. 4338, through cross-examination of the defendant, Charles J. Burmeister.

The Supreme Court of Ohio, in deciding the case of Kniess vs. Armour & Company, 134 O. S. 432, referred to in the instant petition, expressly stated that the question before it was whether the trial court erred in refusing to remove the cause to the District Court of the United States, and that "this question is to be adjudicated solely upon an examination of the allegations contained in the petition of the plaintiff." (Page 437.)

[fol. 106] That Court further stated that it could not give any consideration, upon this question or removal, to the evidence adduced on the trial, which was the subject of the affidavits above referred to. (Opinion, page 440.)

Your respondent, pursuant to the direction and requirement of Title 28, Section 80, United States Code, and of the order and rule laid down by the Supreme Court of the United States in McNutt vs. General Motors Acceptance Corporation of Indiana, Inc., 298 U. S. 178, that the United States District Court is not bound by the pleadings of the parties, but may of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts to ascertain if a separable controversy actually exists, considered the facts shown in said affidavits, in conjunction with the petitions in said causes, and it appeared to the satisfaction of this Court that none of said suits really and substantially involved a dispute or separable controversy wholly between citizens of different states which could be fully determined as between them, and therefore none of said causes were within the jurisdiction of the District Court of the United States, and further that plaintiff Kniess is an alien, whereupon, your respondent made and caused to be entered an order of remand to the Court of Common Pleas of Lucas County, Ohio, in each of said causes, upon the aforesaid grounds not considered or determined by the Supreme Court of Ohio or said Court of Common Pleas, as well as other grounds hereinafter referred to.

[fol. 107] 7. The several petitions for removal of said five causes, filed by petitioner in the Court of Common Please of Lucas County, Ohio, were defective in that they did not allege that the ground for removal was because of the existence of a separable controversy between the respective plaintiffs and Armour & Company, but left it to be inferred

that the ground for removal was diversity of citizenship, which was the only fact pleaded.

8. Answering the statement on page 12 of said petition, paragraph 27, your respondent respectfully states as to the claim of petitioner that the various plaintiffs in each of said causes were estopped to question the jurisdiction of the United States District Court, and consented to the removal proceedings, that such alleged estoppel did not and does not bind the District Court of the United States, nor your respondent as a judge thereof, nor prohibit your respondent, as such judge, from inquiring into the facts of each of said cases to ascertain if a separable controversy actually existed, as required by Title 28, Section 80, United States Code. Nor may jurisdiction of a cause in the United States Court be conferred by consent of the parties.

9. By the order of remand to the state court of each of said five cases, your respondent, as judge, and the District Court of the United States, ceased to have any jurisdiction to consider or determine the several motions of petitioner to vacate and set aside said orders of remand, or to consider the motion of petitioner for leave to amend its petition for removal in the George E. Kniess cause, according to the rule stated in Ausbrooks vs. W. U. Telegraph Co., 282 [fols. 108-109] Fed. 733.

Wherefore, respondent prays that this Court order this cause heard as upon motion, pursuant to Rule 33 of this Court, and that upon such hearing the petition for mandamus be dismissed at petitioner's costs.

[fol. 110] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 8355

ARMOUR AND COMPANY, Petitioner,

v.

THE HONORABLE FRANK L. KLOEB, District Judge, Respondent

Petition for Writ of Mandamus

OPINION—Filed December 5, 1939

Before Hicks, Simons and Allen, Circuit Judges

SIMONS, Circuit Judge.

The petitioner applied for a writ of mandamus to compel the respondent to set aside his order remanding the cause to the State Court and directing him to take jurisdiction of it. We issued an order to show cause to which appropriate reply has been made supported by brief.

The first contention that confronts us is that we have no power to issue the writ because, by Section 81(b) of the Federal Rules of Civil Procedure, writs of scire facias and mandamus were abolished. The short answer to this is that the Act of Congress, Title 28, U. S. C. A. Section 723b, empowering the Supreme Court to promulgate rules of civil procedure, provides that it "shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practices and procedure in civil actions at law." While Section 81(b) is general in its terms, it cannot be construed to apply to Circuit Courts of Appeals, since so construed it would be in the exercise of a power not conferred upon the Supreme Court, nor can the rules so circumscribed by the enabling act be construed as to repeal Title 28, U. S. C. A. Section 377, which confers upon Cir- [fol. 111] cuit Courts of Appeals the power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

But even were we to construe Section 81(b) as forbidding the issue of writs of mandamus by this court, the contention would be of little moment since the rule also provides that "relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." There would seem to be little difficulty, if required, in interpreting the petitioner's application as an appropriate motion upon which to base relief, if to such relief the petitioner is entitled, notwithstanding the designation it has given to it, and notwithstanding that, under the asserted interpretation, we might be foreclosed to issue the more formal and conventional writ of mandamus.

This brings us to a consideration of the meritorious issue raised by the petition and the response.

A number of persons, including George E. Kniess, brought suit against Armour and Company in the Court of Common Pleas of Lucas County for damages claimed to have been suffered in the consumption of food products, materials for which were prepared by Armour and Company, but which were processed by a retailer in Toledo by the name of Burmeister. In each of the five cases, and upon identical petitions, the plaintiffs joined Burmeister as a defendant on the theory that he and the Armour Company were joint tortfeasors. Armour and Company filed its petitions for removal with the Court of Common Pleas accompanied by proper removal bonds. Its petitions were contested by the plaintiffs and were denied. The Kniess case proceeded to trial while the other cases were held in abeyance and it eventually reached the Supreme Court of Ohio, 134 O. S. 432. That court disposed of the case upon the sole ground that the removal petition should have been allowed, because a separable controversy existed as between plaintiff and Armour. It stated the law of Ohio to be that where the responsibility of two tortfeasors differs in degree and in nature, liability cannot be joint and the alleged torts are not concurrent. Holding that the defendant Armour and Company had adequately preserved its exceptions to the ruling of the lower court, the cause was reversed and remanded to the Court of Common Pleas with instructions to grant the removal petition, and the mandate directed the Court of Common Pleas to remove the cause to the District Court of the United States.

[fol. 112] When the case came before the respondent the plaintiff moved to remand and, notwithstanding the adjudication by the Ohio Supreme Court which had become final, the respondent proceeded to take evidence upon the question of a separable controversy, decided there was none, that the cause was not removable under the statute, entered an order to remand the case to the Court of Common Pleas of Lucas County, and denied petitions for rehearing.

It is conceded that as the law now stands no appeal can be taken from an order of remand. The applicable statute is that of March 3, 1887, particularly sections 71 and 80, Title 28, U. S. Code. While this statute does not in terms prohibit the use of a writ of mandamus to review an erroneous order of remand, the Supreme Court, in Employers Reinsurance Corporation v. Bryant, District Judge, 299 U. S. 374, approving the reasoning in In Re Pennsylvania Company, 137 U. S. 451, holds that the two sections must be read in pari materia and, so read, the statute is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process, and the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

Our precise question is then whether this statute, as so interpreted, reaches a case where the District Judge undertook an inquiry into the separable nature of the controversy notwithstanding this issue had been finally adjudicated at the instance of the party seeking the remand by the court of last resort in Ohio and this requires consideration of the precise terms of the removal statute, 28 U. S. C. A., Sections 71 and 80.

Section 71 provides:

"Whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed."

Section 80 which the Supreme Court held must be read in pari materia with Section 71, provides in part:

"If in any suit • • • removed from a State Court to a District Court of the United States it shall appear to the

satisfaction of the District Court at any time after such suit has been * * * removed thereto that such suit does not [fol. 113] really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein but shall * * * remand it to the court from which it was removed."

It would seem that in the use in Section 71 of the words "the District Court shall decide," and in the employment in Section 80 of the phrase "it shall appear to the satisfaction of the said District Court," it was within the contemplation of the Congress that the statue should apply to those cases in which there was some issue which, as a matter of primary decision, was submitted to the District Judge. It certainly could not have been intended to apply to decision of a question which was not properly at issue before the District Judge since it had already been adjudicated by the Supreme Court of Ohio in the same proceeding, between the same parties, and upon the plaintiff's petition. To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A., Section 687, which provides:

"The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court of the United States as they have by law or usage from the courts of the state in which they are taken."

It has been said in reference to the general supervisory power of the Supreme Court over inferior jurisdictions, that it is "of great moment in a public point of view, and should not, upon light grounds, be taken away in any case." In Re Pennsylvania Company, supra. What was there said of the supervisory power of the Supreme Court over this and the District Courts, must apply equally to the supervisory power of this court over jurisdictions inferior to it. The decisions in Employers Reinsurance Corporation v. Bryant, District Judge, supra, and in In Re Pennsylvania Company, supra, must not, in our judgment, be extended beyond the situations requiring the application of the rule there announced, that is to say, to cases where the issue of the petition to remand called for original and primary decision by the District Court unfettered by the doctrine of

res judicata or the mandate of the "full faith and credit" statute.

That the decision of the Ohio Court was res judicata notwithstanding the issue was one involving the jurisdiction of a federal Court, is settled by American Surety Co. v. Baldwin, 287 U. S. 156; Baldwin v. Iowa State Traveling Men's [fol. 114] Assn., 283 U. S. 522, and the decision in Evelyn Treinies, Petitioner, v. Sunshine Mining Co., et al., — U. S. —, announced as recently as November 6, 1939.

While the precise question here involved is one of first impression, the Supreme Court in In Re Metropolitan Trust Company, 218 U. S. 312, has drawn the distinction between orders to remand erroneously issued and those issued by a District Judge in excess of his authority. The former may not be challenged by appeal or writ of mandamus—the latter are a nullity. We think it follows that under general supervisory powers they may be set aside.

Another consideration points to decision. It is somewhat difficult to understand why the plaintiff in the action should seek to remand the case to a State Court already foreclosed from its consideration by the mandate of the Supreme Court of Ohio to which it must bow. Perhaps there is expectation that the pleadings may be amended and so a new issue permitted to be framed that would permit a second appeal, notwithstanding the rule that removability of a case is to be determined by the original pleadings, and notwithstanding the rule of the law of the case. However that may be, the objective of the statute prohibiting review of orders of remand is "to suppress further prolongation of the controversy by whatever process," and the sensing of this objective led to the interpretation announced in In Re Pennsylvania Company, supra. While the federal Courts have been ever solicitous of the limitations upon their own jurisdiction, and ever mindful of the desirability of avoiding unseemly conflicts between the courts of the two sovereignties, they should now accept with grace jurisdiction relinquished by the Ohio Court and end the shuttling of the controversy between the two jurisdictions.

The petitioner is entitled to the writ as prayed. We assume in view of the conclusions expressed herein that its issue will not be required, if the District Judge is not now foreclosed by the Rules of Civil Procedure to vacate the order of remand.*

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ORDER FOR MANDATE—March 12, 1940

Upon a petition for a writ of mandamus to compel the respondent to set aside an order remanding the cause to the State Court, and directing him to take jurisdiction of it, we announced an opinion in the above cause on December 5, 1939, in which we stated it to be our conclusion that the District Court had no power to determine the issue of separable controversy entitling the petitioner to remove because that issue had already been adjudicated by the Supreme Court of Ohio, and the District Court, upon familiar principles, was bound by such adjudication.

In conformity, however, with precedent, and as a gesture of courteous consideration to the District Judge, we did not direct the issue of the writ announcing our assumption that, in view of the conclusions expressed in our opinion, its issue would not be required. We — now advised by counsel for the petitioner that the District Judge has not set aside his order of remand, has not resumed jurisdiction of the cause in conformity with the views expressed in our opinion, and that the plaintiffs in the case have filed motions in the Court of Common Pleas of Lucas County, Ohio, from which they were removed, asking for an order putting the cases upon the assignment list for trial and fixing a date therefor.

In consideration of the above, it is now ordered that a mandate issue forthwith in conformity with the petition and [fol. 116] the conclusions expressed in our opinion commanding the respondent to set aside his order of remand in this cause or causes referred to in the petition, directing him to take jurisdiction thereof, and to set such early date for trial as may conform to his convenience and the business of the court.

[fol. 117] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 118] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1940

No. 965

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Counsel for Respondent.

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SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

IN THE

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Petitioner and Respondent Below,

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Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable Charles Evans Hughes,
Chief Justice of the United States, and the
Associate Justices of the Supreme Court
of the United States:
Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

This was a suit originally filed, on leave first obtained, in the United States Circuit Court of Appeals for the Sixth Circuit, being No. 8355, Original, on the docket of said court, under the following title:

> "In the matter of the application of Armour & Company, an Illinois corporation, for a writ of mandamus against the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and against said District Court." (Record, p. 1.)

The certified transcript of record, filed herewith, shows that the case was decided upon the allegations of the petition and exhibits attached thereto and made a part thereof, and the reply of your petitioner. Said certified transcript is hereinafter referred to as the record. (Record, pp. 61, 66, 71.)

In paragraph one of said petition, the petitioner alleged that at all times prior to May 28, 1938, it was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and maintained an office and place of business in the City of Toledo, Ohio, engaging in the business of selling at wholesale fresh meat and meat products; that as of May 28, 1938, said Kentucky corporation was liquidated and its assets transferred to its sole stockholder, the petitioner, Armour & Company, an Illinois corporation, which assumed the debts and obligations of the Kentucky corporation, and

has continued to maintain said office and place of business and engage in said business in said City of Toledo. (Record, p. 2.)

In said petition said Armour & Company, an Illinois corporation, respondent herein, further alleged that on certain dates, therein stated, between February 1, 1935, and March 2, 1935, five separate petitions, in all material respects identical, were filed by five separate plaintiffs against petitioner, Armour & Company, and Charles J. Burmeister, as defendants, to recover various sums of money as damages for each of the plaintiffs aforesaid because of each of said plaintiffs having contracted the disease known as trichinosis from a pork product known as Boston butts, infected with said disease, sold by Armour & Company to the defendant Burmeister and by Burmeister manufactured into a smoked sausage known as metwurst and sold to one of plaintiffs and partaken of by all of them, in violation of the Pure Food Laws of the State of Ohio, particularly Sections 5774, 5775, 5778 and 12760 of the General Code of Ohio, the full text of which is set forth on pages 18 and 19 of the brief filed herewith.

Said allegations appear in paragraph 2 of said petition (Record, pp. 2 and 3) and Exhibit A, made a part thereof. (Record, p. 10.)

Said petition further stated that Armour & Company seasonably filed a petition and bond, a notice and motion thereof and motion therefor in each of said cases for removal of the same to the District Court of the United States for the Northern District of Ohio, Western Division; that the Court of Common Pleas of Lucas County, Ohio, on hearing, denied each of said petitions; that on March 10, 1936, petitioner filed in each of said cases an

identical motion to reconsider the petition for removal, which motions were denied by said Court of Common Pleas on March 14, 1936, as appears by its journal entries. (Record, pp. 13-19, inclusive.)

Said petition for mandamus then recited that the case of *George E. Kniess vs. Armour & Company and Burmeister* proceeded to trial, the other four cases remaining pending; that on November 30, 1938, the Supreme Court of Ohio rendered its decision in the *Kniess* case in which the judgments of the courts below were reversed on the ground that the petition of Kniess showed that a separable controversy existed and that under ordinary circumstances, in such an action, the liability of the packer is primary and that of the retailer is secondary, so that they cannot be joined as joint tort-feasors. Therefore, the Supreme Court of Ohio remanded the case to the Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove said cause to the District Court of the United States. (Record, pp. 3-5, inclusive.)

Thereafter, as alleged in said petition, the petitions for removal to the District Court of the United States in each of said five cases were granted by said Court of Common Pleas on February 10, 1939, and said causes were removed to said District Court and there docketed on February 17, 1939. (Record, pp. 5, 6.)

On February 22, 1939, the plaintiff in each of said causes filed an amended complaint in the District Court, these being in all material respects identical. This was pursuant to an identical stipulation filed in each of said causes. (Record, p. 6 and p. 23.)

Thereafter, on March 3, 1939, plaintiff, George E.

Kniess, filed a motion to remand said cause, together with two affidavits in support thereof. One of these affidavits recited that said Kniess was not then and had not at any time been a citizen of the United States or of any state thereof, but was still an alien citizen or subject of Germany, in that he had not yet received his final naturalization papers, and that these facts had been unknown to his counsel until within less than a week preceding the filing of said motion to remand. (Record, pp. 6 and 24, 25.)

The second affidavit set forth the exact language of the defendant Burmeister in testifying under cross examination on the second trial of the *Kniess* case, in which for the first time it was learned by plaintiff and his counsel that Armour & Company knew, when it sold the Boston butts to Burmeister out of which the latter made the metwurst from which plaintiff acquired trichinosis, that Burmeister purchased these Boston butts for the express purpose of making this metwurst, and that Armour & Company solicited the order so that Burmeister might make this smoked sausage. (Record, pp. 27-30.) No claim is made by Armour & Company that it denies the truth of or even objected to this evidence.

On March 6, 1939, each of the other four plaintiffs filed an identical motion to remand said cause, together with an affidavit identical in all material respects with the second affidavit filed by Kniess. (Record, pp. 30, 31.)

On March 16, 1939, Armour & Company filed a motion in said District Court, in the *Kniess* case, to amend its petition for removal so as to show that Kniess was a citizen and subject of Germany. (Record, p. 6.)

On April 1, 1939, your present petitioner, as judge

of said District Court, entered an order in each of said five cases sustaining the motion to remand, without opinion. (Record, pp. 7 and 34.)

On April 22, 1939, Armour & Company filed in each of said cases a motion to vacate and set aside said order of remand, which motions were overruled, without opinion, on June 22, 1939. (Record, pp. 7 and 36.)

On the foregoing state of facts Armour & Company claimed in its petition for writ of mandamus that your present petitioner was required by Title 28, Section 687, United States Code, to give full faith and credit to the decisions of the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, that a separable controversy existed in each of said causes; that the question of separable controversy was then *res adjudicata* and that your petitioner transcended his power in ordering said respective remands. (Record, p. 8.)

The petition therefore prayed that a writ of mandamus issue requiring your petitioner to vacate said orders of remand and to reinstate said causes on the docket of said District Court, and to grant Armour & Company's motion to amend its petition for removal in the *Kniess* case.

To this petition your petitioner filed a reply raising the following issues:

1. Denying the jurisdiction of said United States Circuit Court of Appeals to issue a writ of mandamus requiring your petitioner to vacate his former orders of remand in said five cases, because said orders of remand were final orders from which no appeal may be allowed, pursuant to the provisions of Title 28, Section 71, United States Code, and said attempted review by mandamus

of such an order has been expressly forbidden by this court in *Employers Reinsurance Corporation vs. Bryant, Judge,* 299 U. S. 374. (Record, pp. 61 and 62.)

2. That said Circuit Court of Appeals is likewise without jurisdiction to entertain said suit or issue said writ of mandamus because its power to issue said writ is limited by the provisions of Title 28, Section 377, United States Code, to cases in which it has appellate jurisdiction, and in aid of such jurisdiction, and said court has no such appellate jurisdiction as to an order of remand. (Record, p. 62.)

3. That as stated by this court in *United States on the relation of Alaska Smokeless Coal Company vs. Lane, Secretary of the Interior,* 250 U. S. 549, on page 555, the writ of mandamus will not issue to control or direct the exercise of discretionary powers such as were here involved. (Record, p. 62.)

4. That undisputed affidavits filed in support of the motions to remand, showed for the first time both that the plaintiff Kniess was not a citizen of the State of Ohio, nor of any other state, nor of the United States, but was and is an alien; and also that Armour & Company had full knowledge, at the time it sold the pork product known as Boston butts to defendant Charles J. Burmeister, that Burmeister intended to and would make metwurst therefrom, the eating of which metwurst made from diseased pork products so sold by Armour & Company caused each of said plaintiffs to contract the disease known as trichinosis. (Record, p. 63.)

5. That the opinion of the Supreme Court of Ohio in *Kniess vs. Armour & Company,* 134 O. S. 432, expressly stated that the question whether said cause contained a

separable controversy must be adjudicated solely upon an examination of the allegations contained in the petition of the plaintiff, and that unfortunately it could not give any consideration, upon this question of removal, to the evidence adduced on the trial, which was the subject of the affidavits filed with said five motions to remand, hereinbefore referred to. (Record, p. 64.)

But your petitioner stated that pursuant to the direction and requirement of Title 28, Section 80, United States Code, and of the order and rule laid down by this court in *McNutt vs. General Motors Acceptance Corporation of Indiana, Inc.*, 298 U. S. 178, he, as judge of the District Court of the United States, was not bound by the pleadings of the parties, but was required to inquire into the facts of each of said cases, to ascertain if a separable controversy actually existed, and in so doing to consider the facts shown in all of said affidavits; and having done so and further considering that plaintiff Kniess was an alien, your petitioner made and caused to be entered said orders of remand to the Court of Common Pleas of Lucas County, Ohio, upon the said grounds not considered or determined by the Supreme Court of Ohio or said Court of Common Pleas, as well as other grounds later referred to. (Record, p. 64.)

6. That the several petitions for removal of said five causes filed in the Court of Common Pleas of Lucas County, Ohio, were defective in that they did not allege that the ground for removal was because of the existence of a separable controversy between the respective plaintiffs and Armour & Company, but left it to be inferred that the ground for removal was diversity of citizenship, which was the only fact pleaded. (Record, p. 64.)

7. As to the claim of estoppel made in paragraph 27 of the petition of Armour & Company, your petitioner stated that any such alleged estoppel did not bind the District Court of the United States nor your petitioner as judge thereof. (Record, p. 65.)

8. That by making an entry in said orders of remand, your petitioner, as judge, and the District Court of the United States, ceased to have any jurisdiction to consider any further motions on the part of Armour & Company. (Record, p. 65.)

The aforesaid reply was filed on or about October 27, 1939.

On December 5, 1939, said Circuit Court of the United States filed an opinion, without any hearing, briefs or arguments, in which said court expressed the view that your petitioner should vacate all of said orders of remand and resume jurisdiction of said cases, because of the obligation to give full faith and credit to the decisions of the state courts, Supreme and Common Pleas, holding that a separable controversy existed in each of said cases, but no mandate was then issued. (Record, pp. 66-70, inclusive.)

As your petitioner felt it improper to comply with the suggestions of said Circuit Court of Appeals, that court on March 12, 1940, filed a second opinion in said cause and ordered that a mandate issue to your petitioner, which was forthwith done, and said judgment of said Circuit Court of Appeals entered as of that date. (Record, p. 71.)

II

THE BASIS FOR THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION

1. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.)

2. The cases believed to sustain the jurisdiction of this court are as follows:

Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.
Gay vs. Ruff, 292 U. S. 25.
Forsyth vs. Hammond, 166 U. S. 506.

III

QUESTIONS PRESENTED

The following questions are presented for the consideration of this court:

1. Whether the United States Circuit Court of Appeals for the Sixth Circuit had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him remanding five cases to the state court from which they had been removed.

2. Whether your petitioner, after entering orders remanding these five cases to the state court, can regain jurisdiction of said cases by vacating the orders of remand, in obedience to a writ of mandamus.

3. Whether the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Company et al.*, 134 O. S. 432, 17 N. E. (2d) 734 (1938), which held that upon the allegations of the petition a separable controversy existed, foreclosed your petitioner from considering undisputed facts not appearing in said petition which would require the remand of said cause and the other four identical causes to the state court under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. Whether your petitioner was bound to retain jurisdiction of the case of *George Kniess vs. Armour & Company et al.*, after it appeared that George Kniess, the plaintiff, was an alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the original petition a separable controversy existed.

5. Whether the petitions for removal of said five cases were sufficient to justify removal on the ground of separable controversy when they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The issuance, by the Circuit Court of Appeals for the Sixth Circuit, of a writ of mandamus ordering the vacation of orders of remand made by your petitioner is in conflict with the unanimous holdings of this court. In so doing, said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2. There is no method by which your petitioner can carry out the mandate of the Circuit Court of Appeals and regain jurisdiction of these cases. The rule has always been that the vacation of an order of remand does not have that effect.

3. The decision of said Circuit Court of Appeals holding that the decision of the Supreme Court of Ohio, which was based on the petitions alone, finding a separable controversy to exist warranting the removal of said five cases, foreclosed your petitioner from remanding said cases when it later appeared that in fact there was no basis for federal jurisdiction, limits the rights and duties of your petitioner under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. The decision of the Circuit Court of Appeals prohibiting your petitioner from remanding the case of *Kniess vs. Armour & Company et al.*, removed on the ground that a separable controversy existed, when it appeared that Kniess was an alien, is contrary to the decisions of this court and Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

5. The Circuit Court of Appeals erred in holding that a petition for removal, alleging diversity of citizenship as the only ground for removal, was sufficient to warrant a removal on the ground that a separable controversy existed.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Ap-

peals had in the case numbered and entitled on its docket, No. 8355, original, In the matter of the application of Armour & Company, an Illinois corporation, for a writ of mandamus against the the Honorable Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division, and against said District Court, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by this court, and for such further relief as to this court may seem proper.

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

Dated May 3, 1940.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1939

No.....

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,
Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,
Respondent and Petitioner Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II

JURISDICTION

1. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.)

3. This case is one in which the United States Circuit Court of Appeals for the Sixth Circuit, in an original action brought in that court by Armour & Company, respondent herein, issued its writ of mandamus to your petitioner, ordering him as judge of the District Court of the United States for the Northern District of Ohio, Western Division, to vacate certain orders theretofore made by him, remanding five similar cases to the Court of Common Pleas of Lucas County, Ohio, from which the said five cases had been removed to said District Court. (Record, p. 71.)

4. The cases believed to sustain the jurisdiction of this court are as follows:

Employers Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.
Gay vs. Ruff, 292 U. S. 25.
Forsyth vs. Hammond, 166 U. S. 506.

III

STATEMENT OF THE CASE

This has already been stated in the preceding petition under Heading I (pages 2 to 9), which is hereby adopted and made a part of this brief.

To this may be added the further statement that trichinosis is a disease caused from parasites known as trichinae which infect only swine, and such infection occurs solely in such swine through their eating matter containing such parasites, which parasites thereafter lodge in the flesh of the swine before the animal is slaughtered. The only way in which human beings can contract this disease, therefore, is by eating pork from swine so infected. There is no known cure for the disease. (Exhibit A attached to and made a part of petition of Armour & Company, found in Record, page 10 *et seq.*)

Armour & Company sold a quantity of a pork product known as Boston butts, some part of which were infected with these trichinae, from its local establishment in the City of Toledo, to a retail butcher in Toledo named Charles J. Burmeister, who manufactured therefrom a smoked sausage known as metwurst and offered the same for sale. This was in the month of October, 1934. All five of the plaintiffs in the cases referred to in the petition of Armour & Company partook of this metwurst and all contracted the disease of trichinosis therefrom. They brought their respective suits against Armour & Company and Burmeister, joined as defendants in each, to recover damages. (Record, pp. 2, 3.)

The basis of recovery in each of these cases was violation of the Pure Food Laws of the State of Ohio, particularly Sections 5774, 5775, 5778 and 12760 of the General Code of Ohio, which are as follows:

"Sec. 5774. Adulterated and misbranded drugs or food. No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, or offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of this chapter."

"Sec. 5775. Definition of the terms 'drug,' 'food' and 'flavoring extract.' The term 'drug,' as used in this chapter, includes all medicines for internal or external use or inhalation, antiseptics, disinfectants and cosmetics. The term 'food,' as used in this chapter, includes all articles used by man for food, drink, flavoring extract, confectionery, or condiment, whether simple, mixed or compound. The term 'flavoring extract,' as used in this chapter, includes all articles used as a flavor for foods or drinks, whether used or sold as an extract, flavor, essence, tincture or by another name."

"Sec. 5778. Adulterated food, drink, confectionery or condiment; definition. Food, drink, confectionery or condiments are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly, or in part; (3) if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it; (4) if it is an imitation of, or is sold under the name of another article; (5) if it consists wholly, or in part,

of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not or in the case of milk, if it is the product of a diseased animal; (6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; (7) if it contains any added substance or ingredient which is poisonous or injurious to health; (8) if, when sold under or by a name recognized in the eleventh decennial revision of the United States pharmacopoeia, or the sixth edition of the national formulary, it differs from the standard of strength, quality or purity laid down therein; (9) if, when sold under or by a name not recognized in the eleventh decennial revision of the United States pharmacopoeia, or the sixth edition of the national formulary, but if found in some other pharmacopoeia, or other standard work on *materia medica*, it differs materially from the standard of strength, quality or purity, laid down in such work; (10) if the strength, quality or purity falls below the professed standard under which it is sold; (11) if it contains any methyl or wood alcohol."

"Sec. 12760. Selling, etc., unwholesome provisions. Whoever sells, offers for sale or has in possession with intent to sell, diseased, corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars or imprisoned twenty days, or both."

IV

SPECIFICATION OF ERRORS

1. Said Circuit Court of Appeals erred in holding that it had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him remanding

five cases to the state court from which they had been removed.

2. Said Circuit Court of Appeals erred in ordering your petitioner to do something beyond his power to perform, that is, retake jurisdiction of these cases by vacating his orders of remand. The rule has always been that the vacation of an order of remand does not reinvest jurisdiction in the federal court.

3. Said Circuit Court of Appeals erred in holding that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, holding that upon the allegations of the petition alone a separable controversy existed, foreclosed as *res judicata* your petitioner from considering undisputed facts properly brought to his attention, which did not appear in the petition, and which facts would require the remand of these five cases under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

4. Said Circuit Court of Appeals erred in holding that your petitioner was bound to retain jurisdiction of the case of *Kniess vs. Armour & Company,* after it appeared that Kniess was an alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the petition a separable controversy existed.

5. Said Circuit Court of Appeals erred in holding that the petitions for the removal of these five cases were sufficient to justify removal on the ground of separable controversy, although they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

V

ARGUMENT

Point A. Mandamus Will Not Lie to Vacate an Order of Remand

The applicable part of Section 28 of the Judicial Code as amended by the Act of Congress of August 13, 1888, c. 868 (28 U. S. C. A., Sec. 71), reads as follows:

> "Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed."

In an unbroken line of decisions for the last fifty years or more, this court has held that the above quoted language of the statute has also taken away any remedy by mandamus. The two leading cases so holding are *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 380 (1937), and *Re Pennsylvania Company*, 137 U. S. 451. In the former case, Mr. Justice VanDevanter stated (pages 380-381):

> "The provisions in the Act of 1887 * * * are still in force as parts of Sections 71 and 80, 28 U. S. C. A. They are in *pari materia*, are to be construed accordingly rather than as distinct enactments, and when so construed show, as was held in *Morey vs. Lockhart*, 123 U. S. 56, 58, 31 L. Ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.

> "It follows that the remanding order of the District Court was not subject to re-examination by the Circuit Court of Appeals on the petition for mandamus."

Therefore, it is respectfully submitted that the issuance of this writ of mandamus to vacate a final order of remand in the five cases referred to is in conflict with the above applicable decisions of this court, and is so far a departure from the accepted and usual course of judicial proceedings under the aforesaid rulings of this court and of the provisions of the Judicial Code above cited as to call for an exercise of this court's power of supervision.

Point B. Petitioner Cannot Regain Jurisdiction of These Cases by Vacating the Orders of Remand

It has generally been held that a federal district judge is without authority to vacate a remanding order even during the same term. The remanding order reinvests the state court with jurisdiction and terminates the federal court's jurisdiction. *Ausbrooks vs. Western Union Telegraph Co.*, (D. C., Tenn., 1921) 282 F. 733, opinion written by Judge Sanford who later became a Justice of the United States Supreme Court. See also *Ex parte Lange,* 18 Wall. 163, 178, and *Empire Mining Co. vs. Propeller Towboat Co.*, (C. C., S. C., 1901) 108 F. 900; *Chisolm vs. Propeller Towboat Co. of Savannah,* 59 S. C. 549.

We submit, therefore, that it is impossible for your petitioner to carry out the mandate of the Circuit Court of Appeals. He cannot regain jurisdiction of these cases by vacating the orders of remand.

Point C. The Decision of the Supreme Court of Ohio Is Res Judicata Only as to the Existence of a Separable Controversy as Shown by Plaintiff's Petition, But Does Not Prohibit Your Petitioner from Considering Undisputed Facts, Not Appearing in Said Petition, Which Would Require Remand Under Section 37 of the Judicial Code, 28 U. S. C. A., Section 80.

The sole basis for the issuance of the writ of mandamus in this case was that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, was final and *res judicata* of the question of federal jurisdiction, so that the federal district judge could not take cognizance of the actual facts and remand the cases under Section 37 of the Judicial Code. This is readily seen from the following quotation from the opinion of the Circuit Court of Appeals, 109 F. (2d) 72, at 75:

> "To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A., Sec. 687, which provides: 'The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken'." (Record, p. 69.)

The Circuit Court of Appeals stated in its opinion that the precise question here treated is one of first impression. If this is true, it is respectfully submitted that this presents a federal question of great importance, which we believe this court should decide.

But it is the understanding of your petitioner that this is not a case of first impression, but that the following pertinent part of Section 37 of the Judicial Code, 28 U. S. C. A., Section 80, and the decisions interpreting it, govern this situation:

> "If in any suit * * * removed from a state court to the District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The Circuit Court of Appeals decided that this provision did not authorize your petitioner to remand these five cases when it appeared to him that there was in fact no federal jurisdiction, because the Supreme Court of Ohio had already decided that the case was properly removable on the ground of separable controversy, as the same appeared in plaintiffs' petitions. We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability. But the Circuit Court of Appeals overlooked the fact that a federal district judge in remanding a case under the above statute does not decide that it was improperly removed, but merely that it has appeared at a later stage of the proceedings that there is in fact no basis for federal jurisdiction. Removability is determined from the petition and the petition for removal. But the right and duty to remand under the above statute contemplates a consideration of any and all facts which may later appear and which may show that in fact there is no basis for federal jurisdiction. The interpretation of the Circuit

Court of Appeals would entirely circumvent the plain language of this statute, and would prohibit a federal district judge from ever remanding a case; since, in every case removed to the Federal District Court from a state court, the court granting the removal must necessarily decide that it is properly removable. If this is conclusive of the question of federal jurisdiction, then the federal district judge could under no circumstances remand such a case. We submit that the above statute is incapable of such a construction.

The case of *McNutt vs. General Motors Acceptance Corporation of Indiana, Inc.*, 298 U. S. 178, laid down the rule that the above statute vests the District Court with authority to inquire of its own motion, at any time, whether the conditions of jurisdiction have been met, and in so doing the District Court is not bound by the pleadings of the parties. The decision of the Circuit Court of Appeals in the instant case is in conflict with this view. See also *Internat'l & G. N. R. R. vs. Hoyle,* (C. C. A. 5th, 1906) 149 Fed. 180.

It seems to go without saying that the decision of the Supreme Court of Ohio could be *res adjudicata* of nothing more than was there decided, namely, that the petition of the plaintiff, standing alone, showed the existence of a separable controversy. In its opinion, that court stated (134 O. S. 432, 440) that unfortunately it could not give consideration to the evidence adduced on the trial as to the knowledge of Armour & Company of the intended use of its Boston butts in the manufacture of metwurst. But when that fact appeared before the federal district judge, he was bound to remand the case under the above statute.

Point D. Where Plaintiff Is an Alien, No Separable Controversy Exists

Likewise, when it appeared that the plaintiff in *Kniess vs. Armour & Company* was an alien and not a citizen of any state, your petitioner was in duty bound under the above statute (28 U. S. C. A., Sec. 80) to remand the case to the state court for the reason that there is no basis for federal jurisdiction on the ground of separable controversy when the plaintiff is an alien.

Compania Minera y Compradora de Metales Mexicano, S. A., vs. American Metal Company, 262 Fed. 183.

Creagh vs. Equitable Life Assurance Society of United States, 88 Fed. 1.

See also, as dealing with alien defendants:

King vs. Cornell, 106 U. S. 395.

Merchants' Cotton Press & Storage Co. vs. Insurance Company of North America, 151 U. S. 368.

The latter case also held that a mere declaration of intention to become a citizen is insufficient, as such declaration does not make him a naturalized citizen within the meaning of the Removal Act.

The petition for removal in this case alleged that George Kniess was a citizen of the State of Ohio. After the case had been removed to the federal District Court, it appeared that said George Kniess was not a citizen of any state, but was an alien. We submit that this is precisely the kind of situation that the above statute was intended to cover. To require your petitioner to hear this case would extend federal jurisdiction to a situation

clearly not contemplated by the Acts of Congress relating to federal jurisdiction.

There are many cases where a federal district judge has remanded cases removed on the ground of diversity of citizenship when it appeared in the course of the trial that in fact there was no such diversity of citizenship. The same result should be reached when it appears that the plaintiff, in a case removed on the ground of separable controversy, is an alien and not a citizen of this country.

We respectfully submit that the decision of the Circuit Court of Appeals in this behalf is contrary both to the above quoted statute and the applicable decisions interpreting it.

Point E. That the Petitions for Removal in These Five Cases Were Insufficient to Warrant Removal on the Ground of Separable Controversy

As appears from the petition for removal, attached to the petition for writ of mandamus as Exhibit B (Record, p. 13), which is one of five identical petitions filed in the five cases, there is no allegation from which a separable controversy might be even inferred. The only statement made intimates that diversity of citizenship was the sole ground of removal.

But this court has held that where there is no separable controversy, and resident and non-resident defendants are joined, there is no right of removal.

Peper vs. Fordyce, 119 U. S. 469.

This court has held heretofore that the petition for removal itself should plead the facts showing a right in the petitioner to demand the removal.

IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,
Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,
Respondent and Petitioner Below.

REPLY BRIEF FOR PETITIONER

PERCY R. TAYLOR,
740 Spitzer Bldg., Toledo, Ohio,

NOLAN BOGGS,
828 Nicholas Bldg., Toledo, Ohio,
Counsel for Petitioner.

Phoenix Insurance Co. vs. Pechner, 95 U. S. 183.
Crehore vs. Railway Co., 131 U. S. 240.

In *Chesapeake & Ohio Railroad vs. Cockrell*, 232 U. S. 146, this court adhered to the rule but limited the requirements of the petition for removal to the statement of facts not already appearing on the record.

It is respectfully suggested that this rule might be clarified so as to determine whether a petition for removal on the ground of a separable controversy is sufficient where the petition for removal makes no such claim, but the separable controversy is, or may be, inferred from the petition of the plaintiff. Had the Court of Common Pleas, in the five cases here under discussion, granted the respective petitions for removal without any consideration, we submit that it would have been a highly doubtful question to determine, on motion to remand, in the United States District Court, without any claim on the part of the removing defendant that a separable controversy actually existed.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision.

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

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IN THE

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No. 977

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Respondent and Petitioner Below.

REPLY BRIEF FOR PETITIONER

POINT 1—THE REVERSAL OF THE KNIESS CASE BY THE SUPREME COURT OF OHIO WAS BASED ON A MISJOINDER OF PARTIES DEFENDANT, AND NOT UPON A MISJOINDER OF CAUSES OF ACTION

We desire to correct certain inaccuracies in the brief filed by the respondent, as follows:

On page 3 of respondent's brief, it is stated that the Supreme Court of Ohio in its decision in the case of *George Kniess vs. Armour & Co.*, 134 O. S. 432, reversed

the judgment which Kniess had obtained on the grounds, among others, that:

> "2. Separate causes of action against different defendants may only be joined where the liability is joint; and joinder of such distinct causes of action is improper in the instant case under the Ohio statute."

Again, on page 12 of respondent's brief:

> "The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess* case that two separate suits had been improperly combined in the petition."

The foregoing quotations would appear to imply that the ruling of the Supreme Court of Ohio in the *Kniess* case, *supra*, was that there was a misjoinder of causes of action.

Such an impression would be fortified by the quoted provisions of Section 11312, Ohio General Code, on page 13 of the brief for respondent, which statute relates to the procedure if causes of action are misjoined.

The fact is, however, that the Supreme Court of Ohio held that on the allegations of plaintiff's petition, considered alone, there was a misjoinder of parties defendant.

This appears in the second paragraph of the syllabus of the case, reading as follows:

> "2. In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (*Canton Provision Co. vs. Gauder*, 130 Ohio St. 43, approved and followed.)"

Section 11309, Ohio General Code, provides that the defendant may demur to the petition only when it appears on its face either:

> "5. That there is a misjoinder of parties plaintiff or defendant; * * *.
>
> "7. That several causes of action are improperly joined."

Section 11312, Ohio General Code, which as we have said is quoted on page 13 of respondent's brief, concerns only the seventh ground of special demurrer, and has no application to the fifth ground of misjoinder of parties defendant, which was the demurrer actually filed by both Armour & Company and the defendant, Charles J. Burmeister, in the *Kniess* case.

Section 11365, Ohio General Code, is the applicable provision where a demurrer on the fifth ground, such as this, was sustained. It reads, so far as here pertinent:

> "If the demurrer be sustained, the adverse party may amend if the defect thus can be remedied, with or without costs, as the court directs."

POINT 2—PLAINTIFF GEORGE KNIESS COULD NOT HAVE MAINTAINED A PETITION FOR CERTIORARI IN THIS COURT TO REVIEW THE STATE COURT'S ORDER OF REVERSAL

It is suggested on page 4 of respondent's brief that Kniess could have filed his petition for a writ of *certiorari* in this court, as provided by Title 28, Section 344(b), U. S. C. A., to review the order of reversal made by the Supreme Court of Ohio in the *Kniess* case, 134 O. S. 432.

As the statute in question only affords the right to *certiorari* in certain enumerated cases which are, where a judgment or decree has been rendered by the highest

court of the state where is drawn in question the validity of a treaty or a statute of the United States, or the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, it is clear that no petition for *certiorari* could have been entertained by this court to review the judgment of reversal by the Supreme Court of Ohio in the *Kniess* case, *supra*, because none of those necessary elements or grounds for review existed.

Instead, the only question passed upon by the Supreme Court of Ohio in that case was whether the petition of the plaintiff Kniess, tested by the rules of pleading in force in the State of Ohio, stated a cause of action in which the two defendants were properly joined.

On that question, the decision of the Supreme Court of Ohio was final. This was settled by this court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64.

But the question still remains, may the United States Circuit Court of Appeals issue its writ of mandamus to the judge of the United States District Court, to compel the latter to revoke an order of remand to the state court, which order of remand is based upon facts not presented to and therefore not considered by the state court, which ordered the removal in the first place?

Respectfully submitted,

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

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ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent.

BRIEF IN BEHALF OF PETITIONER

I.

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II.

JURISDICTION

1. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.).

2. This case is one in which the United States Circuit Court of Appeals for the Sixth Circuit, in an original action brought in that court by Armour & Company, respondent herein, issued its writ of mandamus to your petitioner, ordering him as judge of the District Court of the United States for the Northern District of Ohio, Western Division, to vacate certain orders theretofore made by him, remanding five similar cases to the Court of Common Pleas of Lucas County, Ohio, from which the said five cases had been removed to said District Court. (Record, p. 71.)

Your petitioner respectfully contends that the questions involved in this case are substantial, for that it has been heretofore determined by this court that a United States Circuit Court of Appeals is without power to issue a writ of mandamus for such purpose.

3. The cases believed to sustain the jurisdiction of this court are as follows:

Employers' Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.

Gay vs. Ruff, 292 U. S. 25.

Forsyth vs. Hammond, 166 U. S. 506.

4. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

The petition for writ of *certiorari* was filed May 6, 1940, and was granted June 3, 1940.

III.

STATEMENT OF THE CASE

(All references to pages are to those of the printed record.)

On July 7, 1939, the respondent Armour & Company filed its petition in the United States Circuit Court of Appeals for the Sixth Circuit, praying for a writ of mandamus against your petitioner Frank L. Kloeb, judge of the United States District Court for the Northern District of Ohio, Western Division, commanding your petitioner, as such judge, to grant respondent's motion to set aside and vacate remanding orders made by your petitioner in five causes removed to the United States District Court from the Court of Common Pleas of Lucas County, in Ohio, and also to grant respondent's motion to amend its petition for removal in one of the five cases, known as the *Kniess* case, and to continue to proceed in all of said causes. (Record, page 2 *et seq.*)

Your petitioner, on October 27, 1939, filed a reply to said petition. (Record, page 61 *et seq.*)

On December 5, 1939, the United States Circuit Court of Appeals rendered a decision holding that respondent was entitled to the writ as prayed, but not directing the writ to issue at that time. (Record, pages 66 to 70, inclusive.)

On March 12, 1940, on petition of Armour & Company, a mandate was issued in conformity with the petition and conclusions expressed in the opinion rendered on December 5, 1939. (Record, page 71.)

The five cases ordered remanded by your petitioner, as judge of the United States District Court, were filed respectively by George E. Kniess, Marie Kniess, Louisa F. Meinecke, Herbert O. Schwalbe and Maybelle Schwalbe, at various dates between February 1, 1935, and March 2, 1935, all of them being against Armour & Company and one Charles J. Burmeister, a retail butcher in the City of Toledo, Ohio, where all the plaintiffs then resided, and still reside. (Record, page 2.)

All five petitions were filed in the Court of Common Pleas of Lucas County, Ohio, and in all material respects were identical. A copy of the petition in the *George E. Kniess* case was attached to respondent's petition, marked Exhibit A, and made a part thereof. (Record, page 3.)

Respondent, within the time allowed by law, filed an identical petition in each of said cases for removal to the District Court of the United States, and as to each gave notice of filing the same, filed bond for removal, and motion for removal. Copies of these pleadings and instruments in the *George E. Kniess* case appear in the record, pages 13 to 16, inclusive. The Court of Common Pleas denied all of said petitions for removal and later denied identical motions to reconsider these petitions for removal, filed in the five cases. (Record, page 3.)

As appears in the petition of *George E. Kniess vs. Armour & Company et al.* (Record, pages 10 to 12, inclusive), each plaintiff claimed damages for having con-

tracted the disease known as trichinosis from eating a portion of smoked sausage known as metwurst which defendant Burmeister had made from a pork product known as Boston butts, sold to Burmeister by defendant, Armour & Company, which Boston butts were adulterated, diseased and infected with parasites known as trichinae, by reason whereof the Boston butts and the metwurst made therefrom were wholly unfit, unsuitable and dangerous for consumption by the respective plaintiffs, and in violation of the Pure Food Laws of Ohio.

By agreement of counsel the *George E. Kniess* case was tried, the other four cases remaining pending until its final disposition.

While respondent's petition does not state the result of the trial of the *George E. Kniess* case in the Court of Appeals for Lucas County, yet as the record does show that the Supreme Court of Ohio reversed the judgment of the Court of Appeals, it is of course properly to be inferred that plaintiff had recovered a judgment in the Court of Common Pleas and that this was affirmed in the Court of Appeals. (Record, page 4.)

Furthermore, it appears in two affidavits in support of motion to remand, that there had been two trials of the *George E. Kniess* case in the Court of Common Pleas. (Record, pages 27 and 31.)

The fact was that at the conclusion of plaintiff's evidence on the first trial, the Court of Common Pleas directed a verdict for the defendants and entered judgment on the same. This judgment was reversed by the Court of Appeals and a new trial ordered, and the Supreme Court of Ohio refused to admit the case on motion of the defendants for an order to certify the record.

It was not until the second trial of this case that cross examination of the defendant Burmeister first elicited the fact, of which plaintiff and his counsel had no previous knowledge, that Armour & Company, when it sold these Boston butts to Burmeister, knew that Burmeister purchased them for the purpose of making metwurst out of them, and that Armour & Company actually solicited that order for that express purpose. (Record, page 27 *et seq.* and 31 *et seq.*)

Because of this lack of knowledge of that very essential fact, on the part of the various plaintiffs and their counsel, no such knowledge or concert of action had been pleaded in any of the five petitions, as may be seen from a reading of the George E. Kniess petition. (Record, page 10.)

Upon the second trial plaintiff recovered a verdict and judgment against both defendants, which was affirmed by the Court of Appeals of Lucas County, Ohio. When the case reached the Supreme Court of Ohio the judgments of the lower courts were reversed solely on the ground that the cause should be removed to the federal court because a separable controversy existed between the two defendants from the allegations of plaintiff's petition and that nothing but the plaintiff's petition could be considered by the court in determining that question.

Kniess vs. Armour & Company, 134 O. S. 432, 434. On page 440 of the opinion, the court said this:

> "While the evidence adduced at the trial shows Armour & Company *knew,* when it sold the Boston butts, that they were to be used in metwurst, there is no allegation in the petition that they had such knowledge. In passing upon the question of re-

moval, unfortunately we are limited solely to a consideration of the facts stated in the petition." (Italics ours.)

The syllabus of the *Kniess* case, which states the law of the decision (*Baltimore & Ohio Railroad Co. vs. Baillie,* 112 O. S. 567), is as follows:

"1. Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"2. In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (*Canton Provision Co. vs. Gauder,* 130 Ohio St. 43, approved and followed.)"

An application for a rehearing filed by plaintiff, George E. Kniess, having been overruled, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County. This mandate directed the Court of Common Pleas to grant the petition to remove the cause to the District Court of the United States. (Record, page 19.)

Thereafter, all five cases were removed to the District Court of the United States for the Northern District of Ohio, Western Division, on February 17, 1939. (Record page 5.)

On March 3, 1939, plaintiff George E. Kniess filed in the United States District Court a motion to remand said cause, together with two affidavits in support thereof, and on March 6, 1939, the other four plaintiffs filed their identical motions to remand their several causes, together

with an affidavit in support of each motion. (Record, page 6.)

These affidavits were of the utmost importance.

In the *George E. Kniess* case the first affidavit was by Kniess himself, and was to the effect that he was a German citizen by birth; that at the age of twenty-one he came to the United States, arriving here on September 3, 1925, and on March 3, 1928, filed his declaration to become a citizen of the United States. For reasons stated in the affidavit, affiant declared that he had never received his final certificate of naturalization, and, therefore, was still a citizen of Germany; that through a misunderstanding on his part as to his situation, he had never advised his attorneys of these facts until within a week prior to the date of this affidavit. (Exhibit J-1, Record, pages 25 *et seq.*)

The second affidavit filed in his behalf was identical in form with those filed in support of the motions for remand of the other four plaintiffs, and recited the evidence given on the second trial by the defendant Burmeister as showing that Armour & Company actually had full knowledge of Burmeister's intention to make this metwurst from the Boston butts he purchased from Armour & Company, and that Armour & Company actually solicited his order for that purpose. (Exhibit J-2, Record, pages 27 *et. seq.*, and Exhibit K-1, Record, pages 31 *et seq.*)

The respective motions to remand appear as Exhibit J, Record, page 24, and Exhibit K, Record, page 30.

On April 1, 1939, your petitioner, as judge of said United States District Court, entered an identical order in each of the five cases, sustaining the several motions to remand. (Record, pages 34 and 35.)

On April 22, 1939, respondent filed in each of these five cases in the United States District Court a motion to vacate and set aside the order of remand, which motions were overruled by your petitioner on June 22, 1939. (Record, page 7.)

Thereafter, respondent filed the instant suit in the United States Circuit Court of Appeals for the Sixth Circuit.

IV.

SPECIFICATION OF ERRORS TO BE URGED

Said United States Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him, remanding five cases to the state court from which they had been removed.

2. In ordering your petitioner to do something beyond his power to perform, that is, retake jurisdiction of these cases by vacating the remanding orders.

3. In deciding that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, holding that upon the allegations *of the petition alone* a separable controversy existed, foreclosed, as *res judicata*, your petitioner from considering undisputed facts properly brought to his attention, which did not appear in the petition, and which facts would require the remand of these five cases under Section 37 of the Judicial Code (28 U. S. C. A., Section 80).

4. In holding that your petitioner was bound to retain jurisdiction of the case of *Kniess vs. Armour & Company*, when it subsequently appeared that Kniess was an

alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the petition, which said nothing about his citizenship, a separable controversy existed.

5. In holding that the petitions for the removal of these five cases were sufficient to justify removal on the ground of separable controversy, although they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

SUMMARY OF ARGUMENT

I. Applicable decisions of this court have established that the orders entered by your petitioner in each of these five cases sustaining the identical motions to remand, and made pursuant to authority vested in your petitioner by Section 37 of the Judicial Code (28 U. S. C. A. 80) were not subject to appellate re-examination by the Circuit Court of Appeals on petition for mandamus or otherwise.

II. Your petitioner cannot regain jurisdiction of these cases by vacating the orders of remand entered by him for the reason that the remanding orders reinvested the state court with jurisdiction and terminated the jurisdiction of the Federal District Court. Therefore, your petitioner is now without authority to execute the mandate of the Circuit Court of Appeals.

III. The decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co.*, 134 O. S. 432, did not conclude your petitioner from thereafter entering the orders sustaining the motions to remand these five cases.

A. Well recognized principles establish the distinctions between the functions and powers of the

state and federal courts in their respective determinations of the question of removability of a cause and clearly indicate the inapplicability of the general doctrine of *res judicata* or estoppel by judgment. While in certain instances it is true that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues, the cases so applying the doctrine and relied upon by respondent and the Circuit Court of Appeals, are no authority for the proposition that the decision of the Supreme Court of Ohio was *res judicata* of the question of the jurisdiction of the Federal District Court.

B. The decision of the Supreme Court of Ohio was not a judicial proceeding entitled to full faith and credit within the provisions of 28 U. S. C. A. 687. However, if this court should be of the opinion that this decision of the Supreme Court of Ohio was entitled to full faith and credit under the foregoing statute, then your petitioner submits that there was no denial of full faith and credit in the instant case.

C. Assuming that your petitioner was bound to follow the decision of the Supreme Court of Ohio that upon the allegations of the petition there could be no joint liability under the Ohio law and that therefore a separable controversy existed, nevertheless that decision did not put an end to the question of federal jurisdiction. Your petitioner, pursuant to Section 37 of the Judicial Code (28 U. S. C. A. 80), could thereafter examine into the facts *sua sponte*, to determine if the controversy was properly within the jurisdiction of the Federal District Court, and upon finding to his satisfaction that it was not, was in duty bound to either dismiss or remand the cases.

IV. It has been established by applicable decisions of this court that a separable controversy to which an alien is a party cannot be removed from a State to a Federal Court, whether the alien is a plaintiff or defendant. It has been established by affidavit, and the fact is now admitted, that the plaintiff in the case of *George E. Kniess vs. Armour & Co.* was an alien and not a citizen of any state. This uncontradicted fact, therefore, established to the satisfaction of your petitioner that this controversy was not properly within the jurisdiction of the Federal District Court, and your petitioner was in fact compelled to either dismiss or remand the cause pursuant to Section 37 of the Judicial Code, *supra.*

V. The right of removal was never properly exercised in the first instance for the reason that the petitions for removal were insufficient in that they failed to allege any ground for removal. By virtue of Section 28 of the Judicial Code your petitioner had ample power and authority to enter the remanding orders for this reason alone.

VI. The decision of the Supreme Court of Ohio was not a final judgment or decree subject to review and determination by this court on writ of *certiorari* within the provisions of Section 344(b) 28 U. S. C. A. Therefore the proper procedure has been followed in the instant case. The decision of the Supreme Court of Ohio does not foreclose the plaintiffs in these cases from proceeding to a trial and determination of their rights in the State Court upon amended petitions showing the joint liability of the defendants Armour & Company and Burmeister.

V.

ARGUMENT

I. An Order Remanding a Cause to a State Court Is Not Subject to Appellate Re-examination on Petition for Madamus or Otherwise.

It is the contention of your petitioner that the orders entered in each of these five cases sustaining the motions to remand, and made pursuant to authority vested in your petitioner by Section 37 of the Judicial Code (28 U. S. C. A. 80) were not subject to appellate re-examination by the Circuit Court of Appeals for the 6th Circuit on petition for mandamus or otherwise.

The applicable statutes are part of Section 28 of the Judicial Code as amended (28 U. S. C. A. 71) and Section 37 of the Judicial Code (28 U. S. C. A. 80). The relevant portions of these statutes are as follows:

> "Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." (Judicial Code Section 28 as amended, 28 U. S. C. A. 71.)
>
> "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially

involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." (Judicial Code Section 37, 28 U. S. C. A. 80.)

These provisions of the Judicial Code were first enacted substantially in their present form by the Act of March 3, 1887 (c. 373 §1, 24 Stat. 552, and c. 373 §6, 24 Stat. 555, as corrected and re-enacted, by the Act of August 13, 1888, c. 866, 25 Stat. at L. 433.[1])

As early as the decision in *Morey vs. Lockhart,* 123 U. S. 56, 57, 31 L. Ed. 68, decided October 1887, this court held that these provisions of the Act of 1887 were intended to apply to all cases removed from a state court and remanded to the latter. Chief Justice Waite speaking for the court in this case said:

"It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such

[1] They have continued unchanged, with the exception of the substitution of "District" for "Circuit Court." Section 6 of the Act of March 3, 1887, *supra,* expressly repealed the last paragraph of Section 5 of the Act of March 3, 1875 (18 Stat. at L. 470, Chap. 137, which had provided:

"* * * that the order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed."

However, it was not until the decision in *In Re Pennsylvania*, 137 U. S. 451, 34 L. Ed. 738, 11 S. Ct. 141 (decided 1890), that this court was required to decide the question of whether the prohibition contained in the second section of the Act of March 3, 1887, had the effect of taking away the power to review remanding orders by mandamus as well as by appeal and writ of error. This court held that the clause in the second section of the Act of 1887 covered not only appeals and writs of error, but also the remedy by mandamus.[2]

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[2] Referring to the prohibition in the second section of the Act of March 3, 1887, Mr. Justice Bradley said:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the Act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Since this decision and in an unbroken line of decisions during the last fifty years, this court has consistently held that an order remanding a cause to a state court is not subject to appellate re-examination on petition for mandamus or otherwise. *Fisk vs. Henarie*, 142 U. S. 459, 35 L. Ed. 1080, 12 S. Ct. 207 (1892); *Missouri P. R. Company vs. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 16 S. Ct. 389 (1895); *Powers vs. Chesapeake & Ohio Railroad Company*, 169 U. S. 92, 42 L. Ed. 673, 18 S. Ct. 264 (1898); *McLaughlin Brothers vs. Hollowell*, 228 U. S. 278, 57 L. Ed. 835, 33 S. Ct. 465 (1913); *In the Matter of Matthew Addy Steamship & Commerce Corporation*, 256 U. S. 417, 65 L. Ed. 1027, 21 S. Ct. 508 (1921). And this rule has been applied whether the cause is remanded under Section 28 of the Judicial Code (28 U. S. C. A. 71) or Section 37 of the Judicial Code (28 U. S. C. A. 80). *Employers Reinsurance Corp. vs. Bryant*, 299 U. S. 374, 57 S. Ct. 272, 81 L. Ed. 291 (1937); *Missouri P. R. Company vs. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 16 S. Ct. 389 (1895); *Maulding Brownell Corp. vs. Sullivan*, 92 F. (2d) 646 (October 1937). In *Employers Reinsurance Corp. vs. Bryant, supra*, decided as recently as 1937, this court again reaffirmed the rule of *In re Pennsylvania, supra*, holding that the prohibition against review applies both to cases remanded under Section 28 of the Judicial Code, *supra*, and those remanded under Section 37 of the Judicial Code, *supra*. The facts in this case were very similar to those in the instant case. The question being presented to this court on *certiorari* to review an order denying a petition for writs of mandamus and prohibition, commanding a judge of a federal district court to vacate an order remanding a cause to a state

court, and prohibiting him from giving any effect to it. It appeared that the remanding order had been entered pursuant to Section 37 of the Judicial Code, *supra*. In affirming the decision of the Circuit Court of Appeals this court held in this case, speaking through Justice Van Devanter on page 378 of its opinion:

> "We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate re-examination on petition for mandamus of otherwise, and secondly, because even if open to re-examination on petition for mandamus, the order was made in the exercise of lawful authority and was appropriate to the situation in which it was made."

The court further said on pages 380 and 381 of its opinion, referring to *In Re Pennsylvania, supra*:

> "The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of §§71 and 80, 28 U. S. C. A. They are in *pari materia*, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey vs. Lockhart*, 123 U. S. 56, 58, 31 L. Ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."

There can be no doubt therefore that that part of Section 28 of the Judicial Code prohibiting review of remanding orders applies to appellate re-examinations on petition for mandamus or otherwise, and includes all remanding orders.

In the instant case the orders entered sustaining motions to remand were made pursuant to authority vested

in your petitioner by Section 37 of the Judicial Code. After the cases had been removed to the federal district court, uncontradicted facts were established by affidavit which made necessary the dismissal or remand of these cases by your petitioner for the reason that it was apparent that the cases were not properly within the jurisdiction of the District Court.

In view of the foregoing applicable decisions by this court, and the now well established principles governing the remanding of cases under Sections 28 and 37 of the Judicial Code, it is submitted that the orders entered by your petitioner sustaining the motions to remand in these cases were not subject to appellate re-examination on petition for mandamus or otherwise. Therefore, the United States Circuit Court of Appeals for the Sixth Circuit was without power to issue the writs of mandamus to your petitioner for the purpose of compelling your petitioner to revoke and vacate the orders of remand previously entered by him in these cases.

II. Jurisdiction of These Cases Cannot Be Regained by Vacating the Orders of Remand.

It is the contention of your petitioner that a federal district court is without authority to vacate a remanding order even during the same term, for the reason that the remanding order reinvests the state court with jurisdiction and terminates the jurisdiction of the federal district court. It is, therefore, submitted that your petitioner is now without authority to execute the mandate of the United States Circuit Court of Appeals and regain jurisdiction of these cases by vacating the orders of remand.

While ordinarily it is within the power of a federal district court to vacate orders during the same term in which they are made,[3] your petitioner maintains that remanding orders entered pursuant to either Section 28 of the Judicial Code, as amended, (28 U. S. C. A. 71), or Section 37 of the Judicial Code (28 U. S. C. A. 80), are an exception to this general rule. Section 28 of the Judicial Code, *supra,* provides in part: "Such remand shall be immediately carried into execution." The purpose of this provision is to avoid delay in the trial of cases. If it were possible for a federal district court to vacate remanding orders, the manifest intent of Congress to avoid delay in the determination and final adjudication of the question of federal jurisdiction would be seriously hampered. Upon entering an order remanding a cause to a state court from whence it has been removed, the jurisdiction of the federal district court has been completely exercised and its authority ended. In such a case there is no authority remaining under which the federal district court may act.

In *Ausbrooks vs. Western Union Tel. Co.,* (D. C. Tenn. 1921), 282 F. 733, at 734, Judge Sanford, who later became a Justice of the United States Supreme Court, said:

> "The remanding order entered herein * * * having *ex propria vigore* reinvested the state court with jurisdiction, necessarily terminated the jurisdiction of this court. And having thus lost jurisdiction of the cause, it is now without authority to vacate the remanding order * * *. The general power of a court to remand or vacate orders, judgments and decrees at any subsequent day of the term at which they were rendered, does not

[3] *Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872 (1874).

extend to cases in which the jurisdiction of the court has been completely exercised and its authority ended.'"[4]

When, therefore, your petitioner entered the orders sustaining the motions to remand these cases to the state court, the jurisdiction of the federal district court was terminated and your petitioner is now without authority to vacate said orders and execute the mandate of the United States Circuit Court of Appeals.

III. The Decision of the Supreme Court of Ohio in the Case of Kniess vs. Armour & Co., 134 O. S. 432, Did Not Conclude Your Petitioner From Thereafter Entering the Orders Sustaining the Motions to Remand These Five Cases to the State Court.

It is the contention of your petitioner that the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra,* in which it was held that upon the allegations of the petition there could be no joint liability under the Ohio law, and that, therefore, there was a separable controversy which should be removed to the Federal District Court, was not a conclusive determination of federal jurisdiction for the following reasons:

A. THE DECISION OF THE SUPREME COURT OF OHIO WAS NOT RES JUDICATA OF THE DETERMINATION OF FEDERAL JURISDICTION.

At this phase of the discussion it is necessary to refer to the distinctions between the functions and powers of

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[4] See also: *Empire Mining Co. vs. Propeller Towboat Co.,* (D. C., S. C., 1901) 108 F. 900; *Chisolm vs. Propeller Towboat Co.,* 59 S. Car. 549.

the state and federal courts in their respective determinations of the question of removability of a cause from a state court to a federal district court.

Section 29 of the Judicial Code (28 U. S. C. A. 72)[5] authorizes the removal of a cause from a state court to the proper Federal District Court upon the filing of a petition disclosing the right to remove and the giving of the required bond. When such petition is filed in a state court it becomes a part of the record, along with the pleadings in the case, and if, on the face of the record, as so constituted, a suit appears to be removable the

[5] "§72. (Judicial Code, section 29.) Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. *It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit.* Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court." (Italics ours.)

state court in which the petition is filed is bound to surrender its jurisdiction in the case and proceed no further. Section 29, *supra*. While an examination of Section 29, *supra*, discloses no right in the state court in the first instance to pass on the sufficiency of the petition and bond for removal, such a practice, in the interest of orderly procedure has been recognized.[6]

Upon the filing of such petition the state court is faced with the determination of a pure question of law, that is to say, whether admitting the facts stated in the petition for removal to be true it appears on the face of the pleadings that the petitioner is entitled to a removal of the suit. *Burlington Cedar Rapids and Northern Ry. Co. vs. Charles L. Dunn*, 122 U. S. 513, 30 L. Ed. 1159 (May, 1887); *Donovan vs. Wells Fargo & Co.*, (Mo., 1909) 169 F. 363, 94 C. C. A. 609, 22 L. R. A. (N.S.) 1250. It is significant that in its determination of the question of removability the state court must accept as true the allegations of fact on the record. *Chesapeake & O. R. Co. vs. Cockrell*, 232 U. S. 146, 58 L. Ed. 548 (1914); *Stone vs. South Carolina*, 117 U. S. 430, 29 L. Ed. 962, 6 Sup. Ct. Rep. 799; *Crehore vs. Ohio & M. R. Co.*, 131 U. S. 240, 33 L. Ed. 144, 9 Sup. Ct. Rep. 692; *Illinois Central R. Co. vs. Sheegog*, 215 U. S. 308, 54 L. Ed. 208, 30 Sup. Ct. Rep. 101, and *Chicago R. I. & P. R. Co. vs. Dowell*, 229 U. S. 102, 57 L. Ed. 1090, 33 Sup. Ct. Rep. 684. All issues

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[6] "The orderly and proper procedure upon presenting a petition and bond for removal is to apply to the state court for a formal order granting the petition; but where this is done, and the order is refused, the cause, if a proper one for removal under the law, stands nevertheless as effectually removed from the jurisdiction of the state court as though such order had been granted." *State Improvement-Development Co. vs. Leininger*, (D. C., Cal., 1914) 226 F. 884.

of fact made upon the petition for removal must be tried in the Federal District Court. *Burlington C. R. & N. R. Ry. Co. vs. Dunn, supra; Chesapeake & O. R. Co. vs. Cockrell, supra.* The effect, therefore, of the state court's determination on the question of removability is either a retention or relinquishment of jurisdiction over the cause, as the case may be. If a state court refuses to grant the petition and bond for removal, such decision does not operate to limit the jurisdiction of the Federal District Court, for in a proper case, the petition and bond being sufficient, the party seeking to remove may nevertheless file the transcript of the record in the proper Federal District Court. *Chesapeake & O. R. Co. vs. Cockrell, supra; Donovan vs. Wells Fargo & Co., supra.* In such a case the Federal District Court may protect its jurisdiction and enjoin the plaintiff from further proceeding in the state court. *Donovan vs. Wells Fargo & Co., supra.* The theory of these cases is that on the filing in the state court in due time of an adequate petition and bond for removal, the jurisdiction of the state court absolutely ceases and that of the Federal District Court immediately attaches, *regardless of any action thereon by the state court.* Any further proceedings in the state court are invalid and void, unless its jurisdiction is actually restored. *Kern vs. Huidekoper,* (Ill., 1881) 103 U. S. 485, 26 L. Ed. 354; *Baltimore & O. R. Co. vs. Koontz,* (Va., 1881) 104 U. S. 5, 26 L. Ed. 643; *Nat. Steamship Co. vs. Tugman,* (N. Y., 1882) 1 S. Ct. 58, 106 U. S. 118, 27 L. Ed. 87; *Manning vs. Amy,* (Mass., 1891) 11 S. Ct. 707, 140 U. S. 137, 35 L. Ed. 386; *Madisonville Traction Co. vs. St. Bernard Mining Co.,* (Ky., 1905) 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. Theoretically

no hearing or order of removal is necessary by the state court, because the case stands as effectively removed as though such order had been granted. *Hansford vs. Stone-Ordean Wells Co.*, (D. C., Mont., 1912) 201 F. 185; *State Improvement Development Co. vs. Leininger*, (D. C., Cal., 1914) 226 F. 884.

It was in light of the foregoing well established principles that this court held in *Chesapeake & O. R. Co. vs. McCabe*, 213 U. S. 207, 53 L. Ed. 765 (1909), that the Federal District Court has a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. Indeed any other result would be anomalous and contrary to all established principles of law. The right of removal is established by Act of Congress which establishes the jurisdiction of the Federal District Courts so that whether a case is removable is a federal question. *Baltimore & O. R. Co. vs. Koontz, supra.*

When a state court grants the petition of removal and in effect decides to relinquish jurisdiction of the cause, the Federal District Court is then called on to take jurisdiction, but whether it will retain jurisdiction, dismiss or remand the case is a question to be independently determined by the Federal District Court. Admitting the right of the state court, however incongruous it may be, to pass in the first instance upon the question of removability, such a determination must be distinguished from the right of the Federal District Court, and in fact its duty, to determine and enforce its jurisdictional limitations pursuant to Section 37 of the Judicial Code (28 U. S. C. A. 80). As will be pointed out in III. C of this argument, *infra*, by virtue of this statute a Federal Dis-

trict Court is not limited to a determination of the right of removal or removability by the allegations in the pleadings, but it may inquire *sua sponte* into the facts to determine if the controversy is properly within its jurisdiction. Its authority in this respect is clear and unquestioned and supersedes any determination with respect to removability whether made by the state or the federal court itself in the first instance.

In view of the foregoing, it seems obvious that the general principles of *res judicata* or estoppel by judgment cannot apply in the instant case, first, to make the decision of the Supreme Court of Ohio *res judicata* of the question of removability, or second, and most clearly, to make the decision of the Supreme Court of Ohio *res judicata* of the question of federal jurisdiction. That is to say, the decision of the Supreme Court of Ohio was not a judgment upon the merits, by a court of competent jurisdiction, between the same parties involving the same cause of action.[7] We feel that a mere statement of this proposition suffices.

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[7] The doctrine of *res judicata*, where applicable, requires that issues of fact or of law once determined by a court of competent jurisdiction shall not be relitigated between the parties. *Hart Steel Co. vs. Railroad Supply Company*, 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1148 (1917). Mr. Justice Clarke on page 299 of the opinion made the following statement:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

However, it has been urged by respondent, and the United States Circuit Court of Appeals for the Sixth Circuit has held, that the decision of the Ohio Court was *res judicata* notwithstanding the issue was one involving the jurisdiction of a federal court. The Circuit Court of Appeals relied upon three cases as sustaining this general proposition. We wish to refer briefly to these three cases to point out their clear inapplicability and the obvious misconstruction of the statement made by this court in one of these cases[8] "that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

The first case cited, *American Surety Company vs. Baldwin,* 287 U. S. 156, 77 L. Ed. 231 (1932), involved the question of the validity of a judgment entered against the Surety Company by an Idaho court on a supersedeas bond. On motion of the Surety Company the state trial court vacated the judgment on the ground that it had been entered in violation of due process of law. On appeal the Supreme Court of Idaho reversed the order vacating the judgment, holding that the Idaho court did have jurisdiction to render the judgment. The Surety Company then applied to the Federal District Court of Idaho for an injunction to enjoin the enforcement of the judgment on the ground that it was void under the due process clause of the Fourteenth Amendment; this was denied and the bill was dismissed. The United States Circuit Court for the Ninth District reversed the decree of the Federal District Court. The two cases came before this court on *certiorari* and this court held in reversing the

[8] The statement is found in the opinion of Mr. Justice Brandeis in the case of *American Surety Company vs. Baldwin, infra.*

United States Circuit Court of Appeals and affirming the Supreme Court of Idaho that there had been an actual adjudication in the Supreme Court of Idaho on the question of the jurisdiction of the trial court which was a bar to proceedings in the federal court to enjoin the enforcement of the judgment for want of jurisdiction. It is submitted that this case is no authority for the proposition that the decision of the Supreme Court of Ohio is *res judicata* in the instant case, for the reason that the case did not involve any question of a determination by a state court of federal jurisdiction, but rather a determination by a state court of the jurisdiction of the state court. It was on page 166 of the opinion of this case that Mr. Justice Brandeis, speaking for the court, said:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin vs. Iowa State Traveling Men's Asso.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517."

However, this statement by this court must be read in light of the whole opinion and the conclusion of the court, and when so read is clearly not intended to extend the application of the doctrine of *res judicata* or estoppel by judgment to the situation presented in the instant case.

The second case cited, *Baldwin vs. Iowa State Traveling Men's Assoc.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517 (1931), raised the question of whether a judgment of a Federal District Court of one state was *res judicata* on the question of jurisdiction over the person in the Federal District Court of another state and this court held that it was. While this case was originally removed from the state court, it is to be noted that the opinion reveals that the question of federal jurisdiction

was determined by the federal court and not the state court in the first instance. Obviously this case is not in point and it is submitted that it is absolutely no authority for the general proposition made by the United States Circuit Court of Appeals in the instant case and so earnestly urged by respondent heretofore.

The third case cited, *Treinies vs. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 1 (1939), is also inapplicable. This case involved the question of whether a decree in an Idaho state court which awarded certain stock in decedent's estate to complainant and held that the judgment of a court of a sister state adjudging the stock to be the property of the defendant in the suit was rendered without jurisdiction of the subject matter, would be regarded as having denied full faith and credit to the latter judgment, so as to preclude the decree from operating as *res judicata* in a subsequent interpleader suit brought in a federal court. This court held that it would not. Obviously this case did not involve any determination by a state court of federal jurisdiction and it is therefore submitted that it is no authority for the general proposition made by the United States Circuit Court of Appeals in its opinion in the instant case. (Rec. 70.) The inapplicability of these three cases to the question of federal jurisdiction in the instant case clearly indicates that the doctrine of *res judicata* even as applied to questions of jurisdiction by the decision of this court is limited to determinations by state or federal courts of their own jurisdiction in the premises, and cannot be extended to a determination by a state court of the question of federal jurisdiction so as to conclude the federal court from making an independent determination of its own juris-

diction under Section 37 of the Judicial Code. Certainly the avoidance of unseemly conflicts between the courts of the two sovereignties must be avoided, but this result cannot be attained, in the interests of ending the shuttling of this controversy, by holding that in the instant case your petitioner *must* accept the jurisdiction relinquished by the Supreme Court of Ohio. Any such result would serve only to increase the evil sought to be avoided.

B. THERE WAS NO DENIAL OF FULL FAITH AND CREDIT TO THE DECISION AND ORDERS OF THE STATE COURT.

It has been urged by respondents in their brief opposing the petition for writ of *certiorari* and held by the United States Circuit Court of Appeals in its opinion (Rec. p. 69) that the orders entered by your petitioner in these cases sustaining the motions to remand constituted a denial to give effect to 28 U. S. C. A., Sec. 687, part of which provides that:

> "* * * The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Your petitioner submits that the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour and Co., supra,* was not a judicial proceeding within the scope of the foregoing statute and was not, therefore, entitled to full faith and credit. However, if this court should be of the opinion that this decision of the Supreme Court of Ohio was entitled to full faith and credit under the foregoing statute, then your petitioner submits that

there was no denial of full faith and credit. The Supreme Court of Ohio decided that on the facts alleged in the pleadings the case was removable and in its mandate (Rec. 19 and 20) remanded the cause to the Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the proper district court of the United States. Your petitioner did not fail to give full faith and credit to the decision of the Supreme Court of Ohio or its mandate. In entering the orders sustaining the motions to remand these causes to the state court your petitioner simply carried out the duty imposed on him by Section 37 of the Judicial Code of enforcing the jurisdictional limitations of the federal district court. There was no denial that upon the face of the pleadings a removable cause existed, there was no refusal to take jurisdiction. However, your petitioner, exercising the power conferred upon him by Section 37, *supra*, upon an examination of the uncontradicted facts established by the affidavits filed, found that the jurisdiction of the federal district court was not properly invoked, and therefore, pursuant to Section 37, *supra*, entered orders sustaining the motions to remand said causes to the state court.

For the foregoing reasons it is submitted that even if 28 U. S. C. A., Sec. 687, be held applicable to the decision of the Supreme Court of Ohio, its mandate, and the orders entered pursuant thereto by the trial court, nevertheless this statute was fully complied with to the fullest extent consistent with its manifest purpose.

C. Assuming That the Decision of the Supreme Court of Ohio Was Determinative of the Existence of a Separable Controversy on the Face of the Plaintiff's Petition, Nevertheless Such Decision Was Not Conclusive on the Existence of Federal Jurisdiction.

The question remains whether the decision by this court in the case of *Erie Railroad vs. Tomkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938), is applicable to the instant case. The result of this decision was to make the state law as applied by the state courts controlling in the trial of cases in the federal courts involving questions of general as well as local and statutory state law.[9] It is submitted that this case is inapplicable to the instant case for the reason that no determination of general, local or statutory state law is in issue in this case. The question presented is whether a federal court has the power to determine its own jurisdiction, and this question involves a determination of jurisdiction under federal statutes. This being true, the rule announced in *Erie Railroad vs. Tomkins, supra,* can have no possible application. However, whether this decision be held applicable or not is immaterial. Its application would in effect only reaffirm the rule followed by this court prior to its decision in *Erie Railroad vs. Tomkins, supra,* that whether a separ-

[9] It was held in this case that the phrase "laws of the several states" in the provision of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20 (28 U. S. C. A. 725) cannot constitutionally be construed as excluding in matters of general jurisprudence the unwritten law of the state as declared by its highest court.

able controversy exists on the face of the pleadings and the record is determined by the state law.[10]

Assuming, therefore, that your petitioner was bound to follow the decision of the Supreme Court of Ohio that upon the allegations of the plaintiff's petition there could be no joint liability under the Ohio law, and that therefore a separable controversy existed, this determination did not put an end to the question of federal jurisdiction as the United States Circuit Court of Appeals erroneously concludes. (Rec. 70.) The fundamental distinctions between Section 28 and Section 37 of the Judicial Code cannot be ignored even in the interest of ending the shuttling of this controversy. Section 28, *supra*, insofar as applicable to this phase of the discussion establishes the right of removal in certain instances and deals generally with the removability of causes. On the other hand, Section 37 covers the much broader field of federal jurisdiction, and vests clear and unquestioned powers in the district court of enforcing its jurisdictional limitations. It is established that a federal district court, acting pursuant to Section 28, *supra*, in a determination of removability is limited, as is the state court, to an examination of plaintiff's pleadings at the time of the petition for removal. *Pullman Co. vs. Jenkins*, 305 U. S. 534, 59 S. Ct. 347, 83 L. Ed. 335 (1939); *Barney vs. Latham*, 103 U. S. 205, 26 L. Ed. 514 (1881);

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[10] *Norwalk vs. Air-Way Electric Appliance Corporation*, 87 F. (2d) 317, 110 A. L. R. 183 (1937); *Cincinnati N. O. & Texas Pac. Ry. Co. vs. Bohon*, 200 U. S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *Chicago & Alton Ry. Co. vs. McWhirt*, 243 U. S. 422, 37 S. Ct. 392, 61 L. Ed. 826; *Chicago Rock Island & Pac. Ry. vs. Dowell*, 229 U. S. 102, 33 S. Ct. 684, 57 L. Ed. 1099.

Graves vs. Corbin, 132 U. S. 571, 33 L. Ed. 462, 10 S. Ct. 196 (1890); *Louisville & N. R. Co. vs. Wangelin*, 132 U. S. 599, 33 L. Ed. 474, 10 S. Ct. 203 (1890); *Salem Trust Co. vs. Manufacturers Finance Co.*, 264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266, 31 A. L. R. 867 (1924). It is equally well established that under Section 37, *supra*, the power of the federal district court to enforce its jurisdictional limitations is by contrast unlimited. It may inquire *sua sponte* into the question of jurisdiction and examine the facts as they really exist to determine if the controversy is properly within the jurisdiction of the court.[11] Furthermore, this section explicity charges the federal district court with the duty of enforcing these jurisdictional limitations, so that if it appears to the satisfaction of said court at any time after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, said court must proceed no further therein, but must dismiss or remand the suit to the court from whence it was removed.[12] Nor does this section prescribe any particular mode or manner in which the question of jurisdiction is to be brought to the attention of the court, nor how such ques-

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[11] *McNutt vs. General Motors Acceptance Corporation of Indiana*, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (May, 1936); *Wetmore vs. Rymer*, 169 U. S. 115, 120, 42 L. Ed. 682, 684, 18 S. Ct. 293 (1898); *Gilbert vs. David*, 235 U. S. 561, 59 L. Ed. 360, 35 S. Ct. 164 (1915); *North Pacific S. S. Company vs. Soley*, 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87 (1921).

[12] *McNutt vs. General Motors Acceptance Corp. of Indiana, supra; Gage vs. Carraher*, 154 U. S. 656, 14 Sup. Ct. Rep. 1190, 25 L. Ed. 989; *Ayers vs. Wiswall*, 112 U. S. 187, 52 Sup. Ct. Rep. 90, 28 L. Ed. 693.

tion, when raised, shall be determined. The method of raising the question has been left to the sound discretion of the federal district judge. *Wetmore vs. Rymer, supra, Gilbert vs. David, supra.* Pursuant to Section 37, the inquiry into the question of jurisdiction may be made at any stage of the proceedings. *Wetmore vs. Rymer, supra.* As recently as 1936 this court in the case of *McNutt vs. General Motors Acceptance Corp. of Ind.. supra,* said of Section 37 on page 184 of the opinion:

> "The Act of 1875, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. *The trial court is not bound by the pleadings of the parties, but may,* of its own motion, if led to believe that its jurisdiction is not properly invoked, *'inquire into the facts as they really exist'.*" (Italics ours.)

and this has been the view of this court for many years.

In view of the established principles of law construing these applicable sections of the Judicial Code, it may be admitted that while your petitioner in the instant case was bound to follow the decision of the Supreme Court of Ohio in its determination that upon the face of the pleadings a separable controversy existed, and while acting pursuant to Section 28, *supra,* your petitioner would be thereafter concluded from remanding these cases. However, your petitioner pursuant to Section 37 was not limited in his determination to an examination of the pleadings alone, but he could and did examine into the facts to determine if the controversy was properly within the jurisdiction of the federal district court, and

finding that it was not, he was compelled to either dismiss or remand the cases.

In the instant case the identical motions to remand properly raised the question of federal jurisdiction and authorized an inquiry into the facts. The affidavits filed in the causes establish, and they have not been contradicted, that the plaintiff in one of the causes[13] was an alien, and further that the defendant Armour & Co. knew at the time that the Boston butts were sold to defendant Burmeister, for what purpose said Boston butts were to be used, which facts were not alleged in the original pleadings filed in the state court. However, as the Supreme Court of Ohio indicated, if such facts had been alleged, they would make Armour & Company jointly liable under the Ohio law with defendant Burmeister.[14] It, therefore, became established to the satisfaction of your petitioner that the plaintiff, George Kniess, was an alien and that in all five cases in fact the defendant Armour and Company was jointly liable with the de-

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[13] The case of *George E. Kniess vs. Armour & Co. et al.*, No. 4338. See record, page 25.

[14] In the opinion by the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra,* the court said on page 440 of the opinion:

> "While the evidence adduced at the trial shows Armour & Company knew, when it sold the Boston butts, that they were to be used in metwurst, there is no allegation in the petition that they had such knowledge. In passing upon the question of removal, unfortunately we are limited solely to a consideration of the facts stated in the petition."

The court further said on page 444 of the opinion:

> "By analogous reasoning in the instant case Armour & Company could not possibly be jointly liable if it did not know that Burmeister was to put the Boston butts in skins and sell them for human consumption."

fendant Burmeister under the Ohio law; that in fact no separable controversy existed between the parties to these causes, and that, therefore, the controversies were not properly within the jurisdiction of the federal district court. Acting pursuant to Section 37 your petitioner then entered the orders sustaining the motion to remand these cases to the state court, thereby enforcing the jurisdictional limitations of this court consistent with the duty imposed by statute.

IV. A Case Is Not Removable on the Ground of Separable Controversy Where Plaintiff Is an Alien.

It is the contention of your petitioner that when it was established upon the filing of the affidavit in the Federal District Court, and this fact is now admitted, that the plaintiff in the case of *George Kniess vs. Armour & Co.* was an alien and not a citizen of any state, it became apparent that this controversy was not properly within the jurisdiction of the Federal District Court and your petitioner, pursuant to Section 37, *supra,* was bound either to dismiss or remand the cause to the state court from whence it had been removed.

Part of Section 28 of the Judicial Code as amended (28 U. S. C. A. 71) provides that a suit may be removed from a state court to the proper Federal District Court on the ground that a separable controversy exists where the suit is "wholly between citizens of different states." In *King vs. Cornell,* 106 U. S. 395, 2 L. Ed. 60 (1882), this provision of Section 28, *supra,* received a literal interpretation when this court held that it excluded aliens from the privilege of removing separable controversies. In reaching its decision in this case the court felt that the

omission of aliens from the foregoing provision was the deliberate intention of Congress.[15] This decision has been consistently affirmed, and it is now unanimously held that a separable controversy to which an alien is a party cannot be removed from a state to a federal court irrespective of whether the alien is a plaintiff or defendant. The theory of these decisions is that since the decision in *King vs. Cornell, supra,* had established that an alien who is a party to a separable controversy is not given a right to remove a cause, the converse of this proposition must be equally true, that is to say, one of several defendants who is a citizen of the United States is not authorized to remove a cause on the ground that there is a separable controversy between himself and an alien plaintiff.[16]

In view of these applicable decisions interpreting this part of Section 28, *supra,* and the uncontradicted fact that the plaintiff in the case of *George Kniess vs. Armour & Co.* was an alien, it is obvious that this controversy was not within the jurisdiction of the Federal District Court and was therefore properly remanded.

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[15] This provision first appeared in the Act of 1875, which repealed Subdivision 2 of Section 639 Revised Statutes. Subdivision 2 originally gave this right to aliens and was not restored by the Act of March 3, 1887.

[16] *Compania Minera y Compradora de Metales Mexicano S. A. vs. The American Metal Company,* 262 F. 183 (D. C., N. D. Texas, 1920); *Creagh vs. Equitable Life Assurance Society of the United States,* 88 F. 1 (C. C. D. Wash., 1898); *Tilman vs. Russo-Asiatic Bank,* 51 F. (2d) 1023 (C. C. A. 2d) 1931; *Laden vs. Meck,* 130 F. 877 (C. C. A. 6th, 1904).

V. The Petitions for Removal Were Insufficient to Warrant a Removal on the Ground of Separable Controversy.

It is the contention of your petitioner that the five identical petitions for removal filed in these cases[17] in failing to allege the existence of a separable controversy and in alleging only diversity of citizenship were insufficient and did not entitle the respondent to remove the causes to the Federal District Court or properly raise the issue of separable controversy in the Federal District Court. It is submitted that therefore the United States Circuit Court of Appeals erred in holding that these petitions were sufficient to justify removal in the first instance.

In a previous part of this argument (III. C., *supra*) we have assumed, for the purpose of argument, that your petitioner might be bound to follow the decision of the Supreme Court of Ohio holding that on the face of the pleadings no joint liability existed under the Ohio law and that therefore a separable controversy existed which should be removed to the Federal District Court. At this phase of the discussion we submit the proposition that the right of removal was never properly exercised in the first instance for the reason that the petition for removal failed to allege any valid ground for removal of the causes to the Federal District Court. An examination of the petitions for removal[18] indicates that the only

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[17] The petition for removal attached to the petition for writ of mandamus as Exhibit "B" (Record p. 13) is one of five identical petitions filed in the five cases.

[18] Ib.

ground for removal alleged, and that only by inference, was the existence of diversity of citizenship. There was no allegation of separable controversy. There was, therefore, no ground for removal alleged because where, as in the instant case, resident and non-resident defendants are joined, there is no right of removal unless there is a separable controversy. *Peper vs. Fordyce*, 119 U. S. 469, 30 L. Ed. 435 (1886).

There is substantial authority to support the proposition that the petition for removal must allege the ground for removal.[19] The theory of these decisions is that insofar as the right of removal exists in only certain enumerated classes of cases, to exercise the right it must be shown that the case comes within one of these classes.[20] This must be done by the petition for removal consistent with the ordinary rules of pleading. *Donovan vs. Wells Fargo & Co., supra.* As the court in *Gates Iron Works vs. James E. Pepper & Co., supra,* said on page 451 of its opinion:

> "• • • the court is strongly inclined to the opinion that a petition for removal must of itself distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies, and not leave the court to grope through the record to find, perchance, something lurking there which, outside the petition, would justify the removal."

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[19] *Chesapeake & O. R. Co. vs. Cockrell,* 232 U. S. 146, 58 L. Ed. 544 (1914); *Gates Iron Works vs. James E. Pepper & Co.,* (C. C., Ky., 1899) 98 F. 449; *Goetz vs. Interlake S. S. Co. et al.,* (D. C., N. Y., 1931) 47 F. (2d) 753; *Keller vs. Kansas City, St. L. & C. R. R.* (C. C., Mo., 1903) 135 F. 202.

[20] *Chesapeake & O. R. Co. vs. Cockrell,* 232 U. S. 146, 58 L. Ed. 544 (1914), on page 151 of the Opinion.

In the interest of orderly procedure, it should not fall upon the state or Federal District Court to look through the record to determine if a ground for removal exists. It is the duty of the petitioner for removal to specifically state the ground for removal.

In failing to allege any ground for removal the petitions for removal of these cases were therefore insufficient and demurrable on their face, and the state court might properly have declined to order the removal. However in permitting their removal, the question of the right of removal then confronted the Federal District Court, but no specific ground for removal being alleged, no issue could be raised by motion to remand. It is submitted that therefore the issue of separable controversy was never before the Federal District Court.

The right of removal never being shown to exist in the first instance, or properly exercised, your petitioner had ample power and authority by virtue of Section 28 of the Judicial Code, *supra*, to enter the orders sustaining the motions to remand, for this reason alone. The United States Circuit Court of Appeals, therefore, erred in holding that these petitions for removal were sufficient to justify removal in the first instance.

At this part of the discussion we call attention to the point made on page 11 of respondent's brief opposing the petition for writ of *certiorari*. Respondent states that as to one of the five cases involved,[21] after it was shown that the plaintiff was not in fact a citizen of Ohio, but an alien, respondent promptly filed a motion to amend the

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[21] The case of *George Kniess, Plaintiff, vs. Armour & Company and Charles J. Burmeister, Defendants*, No. 4338, Record p. 25.

petition for removal to show, if it was a fact, that the plaintiff was an alien. Attention is called to the fact that the federal court made no ruling on this motion. It is submitted that this point is immaterial, and can in no manner aid respondent. That is to say, assuming that the petition for removal had been amended to show that the plaintiff was an alien, this allegation would not have corrected the insufficiency of the petition for the reason that this fact alone would not establish any right of removal. Furthermore, this fact in addition to a specific allegation of separable controversy would likewise fail to establish any right of removal, for the reason that a separable controversy cannot be removed to the federal courts where the plaintiff is an alien (IV., *supra*, this argument).

VI. The Proper Procedure Has Been Followed in This Case.

It is the claim of defendant Armour & Company, respondent herein, that the proper procedure has not been taken in the instant case, that the proper procedure was to petition this court for a writ of *certiorari* to review the order of reversal made by the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra*, as provided in Section 344(b) (28 U. S. C. A.).[22]

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[22] Section 344(b) (28 U. S. C. A.) is as follows:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn

To state this proposition is to condemn it. The decision of the Supreme Court of Ohio was not a final judgment or decree subject to review and determination by this court on writ of *certiorari* within the applicable provisions of the foregoing statute. That decision did not draw in question the validity of a treaty or statute of the United States, or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Nor did that decision deny any federal title, right, privilege or immunity, to either party. Had the Supreme Court of Ohio affirmed the judgment of the lower courts and thereby refused to permit the respondent to remove the case to the Federal District Court, then there would have been a denial of a federal right. That is to say, the right to have the case removed to the Federal District Court. In such a case the judgment or decree of the Supreme Court of Ohio might be subject to review and determination by this court on writ of *certiorari*, otherwise not.

However, all that was decided by the Supreme Court of Ohio was that on the face of the pleadings there was

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in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on *certiorari* under this paragraph."

no joint liability under the Ohio law, that on the face of the pleadings a separable controversy existed which should be removed to the Federal District Court. The Supreme Court of Ohio therefore reversed the judgments of the lower courts and remanded the cause with instructions to grant the petition for removal.[23] There was, therefore, no denial of a federal right or any question left for review and determination by this court on writ of *certiorari*. Thereafter and upon the removal of these five cases to the Federal District Court, the jurisdiction of the state courts was extinguished. The proper procedure then was to raise the question of federal jurisdiction by motions to remand, which was done. Had these motions been denied, the respective plaintiffs could have appealed because the refusal to remand is not subject to the prohibition against appellate re-examination hereinbefore discussed (I.). It is obvious, therefore, that the proper procedure was followed in the instant case.

An examination of the opinion of the United States Circuit Court of Appeals (Record, page 66 *et seq.*) indicates that that court based its decision, in part at least, upon the mistaken belief that the plaintiff, George Kniess, is now foreclosed from proceeding to trial in the state courts. The Circuit Court of Appeals expressed the opinion that the plaintiff could not amend his pleadings in the state court to show joint liability against the defendants Armour & Company and Burmeister. This is a misconception of the Ohio law because the plaintiff in this case can amend his pleadings in the state court to show joint liability against the defendants and so proceed to a final

[23] The mandate of the Supreme Court of Ohio appears on pages 19 and 20 of the record.

determination of the case in the state courts. This is so notwithstanding the decision of the Supreme Court of Ohio that on the face of the original petition a separable controversy existed between the defendants.

Ohio General Code, Section 11309(5)[24] provides that the defendant may demur to the petition (plaintiff's original pleading) where there is a misjoinder of parties plaintiff or defendant.

Ohio General Code, Section 11365[25] permits the amendment of the pleadings where a demurrer is sustained because of the misjoinder of parties plaintiff or defendant.

In reaching its decision the Supreme Court of Ohio held that on the face of the pleadings there was no joint liability, thereby in effect sustaining the demurrer filed by the defendants on the ground of misjoinder of parties defendant.

In view of the foregoing Ohio statutes, had there been no question of removability involved, an amendment would have been allowed by the state court. Now, however, with the case remanded to the state court by your petitioner, if his action be upheld by this court, the question of removability must be no longer an issue in the state court, and the case will stand as if that question

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[24] "Sec. 11309. The defendant may demur to the petition only when it appears on its face either:

* * * * *

"5. That there is a misjoinder of parties plaintiff or defendant;"

[25] Ohio General Code, Section 11365, as far as here pertinent reads:

"If the demurrer be sustained, the adverse party may amend if the defect thus can be remedied, with or without costs as the court directs."

had never been involved. Under these circumstances, it is obvious that the plaintiff may amend his petition to show joint liability of both defendants pursuant to the foregoing Ohio statute, and proceed to trial and final determination of his rights upon the petition as so amended.

Furthermore, and in addition to the right to amend under O. G. C. Section 11365, *supra*, the plaintiff, George E. Kniess, also had a right to amend his petition pursuant to O. G. C. Section 11363.[26] On the trial of the case before a jury in the state court facts were proven which had they been alleged in plaintiff's petition, would have shown the joint liability of Armour & Company and Burmeister. Under O. G. C. Section 11363, *supra*, plaintiff, George E. Kniess, has a right to amend his petition to conform to these proven facts, and thus show joint liability of both defendants. This statute vests broad discretionary powers in the trial court, and has been liberally applied—its fundamental purpose being to permit amendments in the furtherance of justice.[27]

Under the foregoing Ohio statutes the petitions in the other four cases may be amended in the state court to show joint liability of the defendants.

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[26] "Section 11363. Before or after judgment, in furtherance of justice and on such terms as it deems proper, the court may amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the facts proved. When an action or proceeding fails to conform to the provisions of this title, the court may permit either to be made conformable thereto, by amendment."

[27] *Bochmke vs. Traction Co.*, 88 O. S. 156, 102 N. E. 700.

Therefore, it being obvious that these cases may be tried and the rights of the parties fully and completely determined in the state courts upon amended petitions showing joint liability of the defendants, and said cases having been rightfully remanded to the jurisdiction of the state court must remain there, as only by so doing can the shuttling of this controversy between the two jurisdictions come to an end, and further unseemly conflicts between the federal and state courts be avoided.

CONCLUSION

It is respectfully submitted that for the reasons heretofore assigned, the Circuit Court of Appeals clearly exceeded its powers in issuing this writ of mandamus against your petitioner, and that its decision should be reversed, and your petitioner sustained as having properly exercised his judicial powers and discretion in the premises.

Respectfully submitted,

PERCY R. TAYLOR,
NOLAN BOGGS,
Counsel for Petitioner.

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

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No. 977

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I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and

appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

No petition for rehearing was filed in the court below.

II

JURISDICTION

1. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

2. Petitioner requests this court to review this judgment by virtue of the authority contained in Judicial Code, Sec. 240, as last amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938 (Title 28, Sec. 347(a), U. S. C. A.). Respondent concedes this court has authority to review the judgment below; but respondent urges that there are no reasons pursuant to Rule 38 (Rules of the Supreme Court) or otherwise for the exercise of this court's discretionary powers and asserts that:

This court should not grant the petition prayed for, as the question involved has been settled by this court. The cases believed to sustain respondent's assertion are:

Rooker vs. Fidelity Trust Co., 263 U. S. 413;

Baldwin vs. Iowa State Traveling Men's Assoc., 283 U. S. 522, 524-526;

American Surety vs. Baldwin, 287 U. S. 156, 164-167.

III

STATEMENT OF THE CASE

In the light of the action of the petitioner in refusing to retain jurisdiction of this cause, a review of the proceedings prior to his decision is necessary.

Five plaintiffs filed separate actions against Armour & Company, hereinafter referred to as "Armour," and Charles J. Burmeister, hereinafter referred to as "Burmeister," in the Court of Common Pleas at Toledo, Ohio. In all material respects, petitions of the plaintiffs are identical. Each seeks to recover money damages for injuries claimed to have resulted from contracting a disease known as trichinosis due to the alleged presence of trichinae in *fresh pork* sold by Armour to Burmeister, and thereafter manufactured by Burmeister into a smoked product known as mettwurst sausage, which was "a food product, ready for human consumption without cooking or further treatment." (R. 11.)

The case of George Kniess, who was one of the five plaintiffs, was tried as a test case, and the other four remained pending. The Supreme Court of Ohio, on November 30, 1938, rendered its decision in the case, *George Kniess vs. Armour*, 134 O. S. 432, 17 N. E. (2d) 734, 119 A. L. R. 1348. The Supreme Court of Ohio reversed the judgment against both defendants on the grounds that:

1. The defendants were not jointly liable under the laws of Ohio.

2. Separate causes of action against different defendants may only be joined where the liability is joint; and joinder of such distinct causes of action is improper

in the instant case under the Ohio statutes and does not defeat the right of a non-resident defendant to remove to the federal court the separate suit against such defendant.

3. Armour was entitled to remove the cause of action against it to the United States District Court.

4. The judgment against Burmeister was reversed because he was not jointly liable under the laws of Ohio.

The mandate (R. 19) being returned to the Court of Common Pleas, the petition for removal to the District Court of the United States in each of said five cases was granted by the Court of Common Pleas, and said causes were removed to and duly docketed in the United States District Court.

Instead of filing a petition for a writ of *certiorari* to this court, as provided by law, Title 28, Sec. 344(b), U. S. C. A., the plaintiff, George Kniess, on March 3, 1939, filed a motion to remand, as likewise did the plaintiffs in the other four cases. In the *George Kniess case,* there was filed an affidavit in support of the motion to remand in which Kniess claimed to be an alien and a subject of Germany, and to conform to the alleged facts, Armour filed a motion in the District Court to amend its petition for removal, so as to show that Kniess was a citizen and a subject of Germany, if such was the fact, such amendment being authorized by Title 28, U. S. C. A., Sec. 399. The petitioner in this cause never made any ruling on the motion to amend. Petitioner entered an order remanding the *Kniess case* and the four companion cases, in which it is not claimed the plaintiffs are aliens, but no opinion was filed in sustaining the motion to remand. Thereupon Armour filed in each of said cases a motion

to vacate and set aside the order to remand (R. 36), but said motions were overruled without opinion (R. 7).

Thereupon Armour brought an original action by filing a petition for a writ of mandamus in the United States Circuit Court of Appeals for the Sixth Circuit (R. 2-7), leave having first been obtained (R. 1), requesting the United States Circuit Court of Appeals to issue the writ on the ground that petitioner failed to give full faith and credit to the decisions and orders of the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, as required to do by law (Title 28, Sec. 687, U. S. C. A.); that the petitioner transcended his power in remanding these cases, as there was not and could not be any matter presented to him for determination that had not previously been passed upon and finally disposed of by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio; that the decision of the Supreme Court of Ohio to the effect that the separate suit against Armour was removable was then *res adjudicata;* and the power to review the decision of the Supreme Court of Ohio is vested solely in the Supreme Court of the United States (Judicial Code, C. 229, Sec. 1); 43 Stat. 937, as last amended February 13, 1925 (Title 28, U. S. C. A. 344(b)) and cannot be exercised by the petitioner herein. (R. 7-10.)

Armour's contention in the above respects for the Circuit Court of Appeals are set forth in a memorandum in support of its motion for leave to file the petition, which appears in the record at pages 40 to 60. These contentions were adopted by the United States Circuit Court of Appeals in its opinion which is reported in 109 Fed. (2d) 72, and which appears in the record, pages 66, *et seq.*

IV

ARGUMENT AND LAW

A. The Writ of Mandamus Is the Only Available Remedy to Correct the Refusal of the District Court to Give Full Faith and Credit to the Judgments of the Ohio Courts.

The respondent concedes that an order of remand by a District Court is not reviewable by appeal or writ of error and likewise concedes that the usual order of remand following an original determination of the question by the District Court is not reviewable by way of a write of mandamus.(1)

It is the contention of Armour in the instant case that the action of the District Court went beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the state courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the state courts. 28 U, S. C. A., Sec. 687, provides in part that:

> "* * * The records and judicial proceedings of the courts of any State * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage from the courts of the State in which they are taken."

It is well settled that a judgment in the courts of a state is conclusive in the federal courts between the

(1) *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 378-381.

parties whether the question determined was one of federal, general or local law, even though the state courts may have decided a jurisdictional question erroneously.(2)

The plaintiffs in the State Court had a right to litigate either in the State Court *or* in the District Court the question as to whether or not Armour and Burmeister were properly joined. The plaintiffs, had they desired to do so, could have permitted the Common Pleas Court to issue an *ex parte* order of removal. On the other hand, they could, and *in this instance did,* request and receive a hearing on that question in the Court of Common Pleas and in the Court of Appeals of Lucas County, Ohio and in the Supreme Court of Ohio.

It is the contention of Armour that an adequate state remedy was available to the plaintiffs in the State Court, and having invoked that and pursued it to final judgment, they cannot escape the effect of that adjudication.(3)

It was the duty of the Supreme Court of Ohio to decide the questions presented to it. That decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, nor subject to revision by the District Court of the United States. It merely left it open to reversal or modification in this court, providing an appropriate and timely proceeding was instituted. Until reversed or modified by this court, the decision of the Supreme Court of Ohio constituted an effective and conclusive adjudication. No court of the United States except the Supreme

(2) *Baldwin vs. Iowa State Traveling Men's Association,* 283 U. S. 522, 524-526;
American Surety Co. vs. Baldwin, 287 U. S. 156, 164-167.

(3) *American Surety Co. vs. Baldwin, supra;* (1)
Baldwin vs. Iowa State Traveling Men's Association, supra. (1)

Court can modify that judgment. This court will compel all courts of the United States to give full faith and credit to that judgment until it reverses or modifies it in the manner authorized by law.[4]

It would be extremely rare for a District Court of the United States to disregard a decision of the State Court upon a question on which the state law is admittedly conclusive. Not only is this required by law, but it is indispensable for the preservation of the proper relations between federal and state courts. The orderly administration of justice requires that courts of the United States having no appellate functions over state courts should not be resorted to in order to nullify or supersede by their decrees a decision of the highest court of the state between the same parties. It was the right and duty of the Circuit Court of Appeals to give great weight to the decision of the Supreme Court of Ohio and to respect it and give effect to it as a decision which estopped the parties from renewing the same contentions before the United States District Court of Ohio. The highest degree of courtesy, good faith and respect should mark the relations between courts of different jurisdictions, and since the petitioner herein failed and refused to give effect to the judgment of the Supreme Court of Ohio, it was the duty of the United States Circuit Court of Appeals to compel him to do so.[5]

The mere form of the application made to the District Court does not determine the issue decided. The question before this court is not whether mandamus is proper to review an order made in response to a petition

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(4) *Rooker vs. Fidelity Trust Co.*, 263 U. S. 413.

(5) *City of Boston vs. McGovern*, 292 Fed. 705, 707-710-714-718. *Certiorari* denied, 265 U. S. 581.

designated as a motion to remand, but whether a District Court of the United States has power to review a decision of the Supreme Court of Ohio and in the attempted exercise of that power divest itself of jurisdiction of a controversy committed to it under the laws of the United States. Mandamus is the appropriate remedy where the District Court asserts a power it does not have.[6]

If the petitioner's contentions are correct, the Court of Common Pleas of Lucas County, Ohio, is faced with a mandate of the Supreme Court of Ohio ordering the causes in question removed, and with a conflicting mandate from the District Court purporting to make a second determination and a contradictory order on the same question. This situation certainly does not accomplish the objects of the removal statutes "to suppress further prolongation of the controversy."[7] Surely it was never intended that a question should be litigated through the courts of Ohio and finally determined by the Supreme Court of Ohio and that the identical question could then be considered *de novo* by the District Court and decided by the District Court contrary to the decision of the Supreme Court of Ohio, particularly when it is admitted that the question involved is determined exclusively by the law of Ohio, as construed by the courts of Ohio.

Counsel for petitioner agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, but claim that the Federal Court in remanding "does not decide that it was improperly removed, but merely that it has appeared at a later stage of the proceedings that there is in fact no basis for fed-

(6) *Metropolitan Trust Co.*, 218 U. S. 312;
Windholz vs. Everitt, 74 Fed. (2d) 834.

(7) *Employers Reinsurance Company vs. Bryant, supra* (1)

eral jurisdiction." The petitioner's position is stated on page 24 of his brief as follows:

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata on the question of removability, because that question can only be solved* on a determination of the substantive law of the State of Ohio with respect to joint liability. But the Circuit Court of Appeals overlooked the fact that a federal district judge in remanding a case under the above statute does not decide that it was improperly removed, but merely *that it appeared at a later stage of the proceedings that there is in fact no basis for federal jurisdiction.* Removability is determined from the petition and the petition for removal. But the right and duty to remand under the above statute contemplates a consideration of any and all facts which may later appear and which may show that in fact there is no basis for federal jurisdiction. * * *." (Italics ours.)

In support of the foregoing statement, the petitioner cites two cases that are in no wise in point. On the contrary it is well settled that the federal court does not lose jurisdiction once it has attached, even though the plaintiff may amend to reduce his claim below the jurisdictional amount;[8] the plaintiff dismisses the case after the defendant has filed a counterclaim below the jurisdictional amount;[9] the residence of the parties is changed or a substitution is made so that the requisite diversity of citizenship no longer exists;[10] the plaintiff files an

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(8) *Kanouse vs. Martin*, 15 How. 198; *St. Paul Indemnity Co. vs. Cab Co.* 303 U. S. 283.

(9) *Kirby vs. American Soda Fountain Co.*, 194 U. S. 141, 146.

(10) *Morgan's Heirs vs. Morgan*, 2 Wheat. 290, 297;
Mollan vs. Torrance, 9 Wheat. 537;
Dunn vs. Clarke, 8 Pet. 1;
Clarke vs. Mathewson, 12 Pet. 164;
Phelps vs. Oaks, 117 U. S. 236;
Hardenberg vs. Ray, 151 U. S. 112;
Wichita R. & Light Co. vs. Public Utilities Comm'n, 260 U. S. 48.

amended pleading which would not have warranted a removal originally;[11] or even if it appears from the original petition that the defendant has a valid defense on the merits if asserted.[12]

Obviously the result of the case does not affect or determine the jurisdiction of the federal court. If it did, the court could never enter a judgment for the plaintiff for less than $3,000 and could never enter a judgment for the defendant, but would always be required to remand the cause to the state courts.

The petitioner makes the further point that as to one of the five cases involved, it appeared after an amended complaint, stipulation and answer had been filed in the federal court, that the plaintiff was not in fact a citizen of Ohio, but was an alien. As previously stated, Armour promptly filed a motion pursuant to 28 U. S. C. A. 399 to amend the petition for removal to show, if it was a fact, that the plaintiff was an alien. The District Court made no ruling on this motion and by disposing of all five cases in the same fashion apparently took the position the alienage of the one plaintiff was not material to the disposition of the case.

We agree that a cause cannot be removed on the ground of separable controversy when the plaintiff is an alien. However, it is well settled that where the plaintiff has joined in the same petition a separate suit against one defendant with a separate and distinct suit against another defendant, either separate suit may be removed

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(11) *Pullman Co. vs. Jenkins*, 305 U. S. 534, 537.

(12) *Interstate B. & L. Ass'n vs. Edgefield Hotel Co.*, 109 Fed. 692;
Armstrong vs. Walters, 219 Fed. 320;
Mullins Lumber Co. vs. Williamson & Brown Land Co., 246 Fed. 232.

on the grounds of diversity, whether the plaintiff is an alien or a citizen.[13]

The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess case* that two separate suits had been improperly combined in the petition and in fact reversed as to the defendant Burmeister, solely on the ground that his demurrer for misjoinder of parties should have been sustained. The holding by the Supreme Court of Ohio in the *Kniess case* is discussed somewhat further in *Losito vs. Kruse, Jr.*, 136 O. S. 183 (decided January 3, 1940). After citing the *Kniess case* and several others, the court said at page 187:

> "* * * In such case *there can be no joinder in a single action* of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition it is demurrable for misjoinder of parties defendant. If it does not appear on the face of the petition but develops from the evidence on the trial, the plaintiff may, on motion, be required to elect as to which one of the two he will pursue, dismissing the other from the action, but not necessarily from the claim. *Canton Provision Co. vs. Gauder, supra; Bello vs. City of Cleveland, supra;*

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(13) *Lucania, etc. vs. U. S. Corporation*, 15 Fed. (2d) 568;
Stewart et al. vs. Nebraska Tire & Rubber Co., 39 Fed. (2d) 309;
Tillman vs. Russo Asiatic Bank, 51 Fed. (2d) 1023;
Hammer et al. vs. British Type Investors. Inc., 15 Fed. Supp. 497;
Rogge vs. Michael Del Balso, Inc., 15 Fed. Supp. 499;
Young vs. Southern Pacific Co., 15 Fed. (2d) 280.
The foregoing cases hold that a right of removal exists as to a "separate suit" even though it is permissible under the state practice to join it in the same petition with a "non-removable suit."
It necessarily follows that the right to remove exists in the five cases against Armour where the joinder in the same petition of the claims against Burmeister is not under the Ohio law permitted.

Morris vs. Woodburn, supra; Village of Mineral City vs. Gilbow, supra; French, Admr., vs. Central Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N.S.) 669; *City of Rochester vs. Campbell,* 123 N. Y. 405, 25 N. E. 937; *City of Chicago vs. Robbins,* 67 U. S. (2 Black) 418, 17 L. Ed. 298."

In other words, had the cases remained in the state courts, the plaintiffs would be required to file a separate petition against Armour and a separate petition against Burmeister[14] under the provisions of Ohio General Code 11312, which provides:

> "Procedure if causes are misjoined. When a demurrer is sustained on the ground of misjoinder of several causes of action, on motion of the plaintiff the court may allow him, with or without costs, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and be proceeded in without further service."

The petitioner also suggests that the petitions for removal did not in terms state that "a separable controversy" existed. The existence of a separable controversy or of a separate suit which entitled Armour to remove was dependent entirely upon the allegations of the plaintiff's petition, and it is well settled that the petition for removal should only include statements of fact not already appearing on the record.[15] Furthermore, the petitioner in another part of his brief (page 24) states:

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can

(14) Compare *McGowan vs. Rishel,* 125 O. S. 77, 80.

(15) *Chesapeake & Ohio Railroad vs. Cockrell,* 232 U. S. 146.

only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability."

The petitioner agrees that this question has been finally disposed of by the Supreme Court of Ohio. It is also true that it was decided correctly. The petitioner's claim that he possesses power to review and reverse the decision of the Supreme Court of Ohio finds no support in the statutes or authorities.

CONCLUSION

We respectfully submit that the action of the court below was in all respects proper and that no substantial purpose can be served except a further "prolongation of the controversy" by granting a writ of *certiorari* in this case.

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FRED A. SMITH,
JOHN P. DOYLE,
Counsel for Respondent.

Of Counsel:
WELLES, KELSEY, COBOURN & HARRINGTON.

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In the

Supreme Court of the United States

October Term, 1940

No. 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth Circuit was filed on December 5, 1939, and appears in the record, page 66, *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II

JURISDICTION

Respondent concedes this court has jurisdiction to review the judgment below.

The date of the judgment to be reviewed is March 12, 1940. (Record, page 71.) The petition for writ of *certiorari* was filed May 6, 1940, and was granted June 3, 1940.

III

SUPPLEMENT TO STATEMENT OF CASE APPEARING IN PETITIONER'S BRIEF

The petitioner's statement of the case is substantially correct. There are, however, certain omissions of pertinent facts to which attention should be called.

After the five cases in question had been removed from the state court and docketed in the federal court, separate answers were filed by Armour and Company in each case, and thereafter an identical stipulation was filed in each case permitting the plaintiff to file an amended complaint without prejudice to the rights of the defendants to move to strike any new matter, said stipulation further providing that the defendants' answers should stand as answers to the amended complaint. Thereafter the plaintiff in each case filed an amended complaint and the defendant, Charles J. Burmeister, filed a separate answer in each case. *All these proceedings*

were prior to the time any motion to remand was filed. (R. 6. paragraphs numbers 12 to 16, inclusive.)

Shortly after the motion to remand in the *George E. Kniess case* was filed, together with an affidavit claiming that he was an alien, Armour and Company filed a motion pursuant to Judicial Code Section 274c (28 U. S. C. A., Section 399) to amend its petition for removal to correctly state the facts in the event it was ascertained that George E. Kniess was an alien. Before any investigation could be made on that question, the District Court, without making any ruling on the question of whether George E. Kniess was an alien or any ruling on the motion to amend in the event that was found to be the fact, entered an order remanding all five cases. (R. 6 and 7, paragraphs numbers 17 and 18.)

The petitioner's statement of the facts is incorrect in regard to the decision of the Supreme Court of Ohio in *Kniess vs. Armour and Company*, 134 O. S. 432. In petitioner's brief (page 6) appears the statement that the Supreme Court of Ohio reversed the lower courts "solely on the ground that the cause should be removed to the federal court because a separable controversy existed." In fact, the judgment against defendant Burmeister was reversed because he was not jointly liable under the law of Ohio, the Supreme Court of Ohio stating in its opinion:

> "* * * Burmeister filed a demurrer on the ground of misjoinder, asserting that there was a want of joint liability. Therefore, the judgment, which was a joint one, cannot stand as to either defendant. See *Stark County Agricultural Society vs. Brenner, supra*, at page 575. * * *" (Page 445.)

IV

SUMMARY OF ARGUMENT

1. Where the State Supreme Court has determined in a tort action that the liability of one defendant is primary and the liability of another defendant secondary, so that a joint judgment cannot be maintained and where after considering the petition for removal of the non-resident defendant, directs the lower court to grant the petition of the non-resident defendant, that determination of fact and law is conclusive upon the parties and cannot be reviewed by the United States District Court on a motion to remand.

2. The power of the petitioner to pass upon the question of whether the respondent and the resident defendant were properly joined in the suits brought by Kniess *et al.*, was barred by the proceedings taken in the state courts, which ripened into a final judgment constituting *res judicata* to which petitioner was required to give full faith and credit (R. S. 905, 28 U. S. C. A. 687).

3. The decision of the Supreme Court of Ohio was reviewable by this court on *certiorari*. (Judicial Code, Section 237, Amended; 28 U. S. C. A. 344.)

4. Petitioner's order of remand in the *George E. Kniess case* denied respondent the right to amend the petition for removal as requested in respondent's motion therefor, pursuant to Judicial Code Section 274c (Mar. 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

5. The orders of remand entered by petitioner are not reviewable by appeal or error, and being in excess of petitioner's jurisdiction, a writ of mandamus is the proper method of correcting the error.

V

ARGUMENT AND LAW

Propositions 1 and 2 in our summary of the argument are so inter-related that we shall discuss them as one subject, and concisely stated, the propositions are as follows:

1. and 2. Separable Controversy Is Determined by the Laws of the State Where the Action Is Maintained and the Determination of That Fact by the State Supreme Court Fixes the Status of the Parties and the Law Requires the United States District Court to Give Full Faith and Credit to That Judgment.

It has always been held that the law of the state from which removal is sought determines whether the controversy is a separable one.(1) This is admitted by the petitioner. (Petitioner's brief, pages 31 and 32. Also petitioner's brief in support of petition for *certiorari*, page 24.)

It is likewise well settled that the court to which such petition for removal is presented has jurisdiction, in the first instance, to examine the petition for removal of the cause and to deny such removal if it shall appear

(1) *Cincinnati, N. O. & T. P. Rd. Co. vs. Bonn*, 200 U. S. 221, 50 L. Ed. 448, 26 S. Ct. 166;

Chicago & Alton Ry. Co. vs. McWhirt, 243 U. S. 422, 61 L. Ed. 826, 37 S. Ct. 392;

Chicago Rock Island & Pacific Ry. vs. Dowell, 229 U. S. 102, 57 L. Ed. 1090, 33 S. Ct. 684;

Norwalk, Admx., vs. Air-Way Electric Appliance Corp., 87 F. (2) 317, 110 A. L. R. 183.

that the petitioner is not entitled thereto.[2] This is likewise admitted by petitioner. (Petitioner's brief, page 22.)

Kniess *et al.* had a right to litigate the question as to whether the respondent and Burmeister were properly joined, either in the state court or in the federal court. Had they desired to do so, they could have permitted the Common Pleas Court to issue an *ex parte* order of removal. On the other hand, Kniess *et al.* could and in this instance did request and receive a hearing and determination of that question in the Court of Common Pleas and the Court of Appeals for Lucas County, Ohio, and in the Supreme Court of Ohio.

It is the contention of respondent that an adequate state remedy was available to Kniess *et al.* in the state courts and having invoked that and pursued it to final judgment, they cannot escape the effect of that adjudication.

It was the duty of the Supreme Court of Ohio to decide the questions presented to it. That decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, nor subject to revision by the District Court of the United States. It merely left it open to reversal or modification in this court, providing an appropriate and timely proceeding was instituted. Until reversed or modified by this court, the decision of the Supreme Court of Ohio constituted an effective and conclusive adjudication. No court of the United States except the Supreme Court can modify that judgment. This court will compel

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(2) *Burlington C. R. & N. R. Co. vs. Dunn*, 122 U. S. 513, 30 L. Ed. 1159.
Powers vs. C. & O. R. Co., 65 Fed. 129, affirmed 169 U. S. 92, 42 L. Ed. 673.
Missouri K. & T. R. Co. vs. Chappell, 206 Fed. 688.
Miller vs. Soule, 221 Fed. 493.

all courts of the United States to give full faith and credit to that judgment until it reverses or modifies it in the manner authorized by law.[3]

In the brief filed in support of the petition for *certiorari*, it was stated (page 24):

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability. * * *"

However, in petitioner's brief on the merits (page 25) it is now contended that the decision by the Supreme Court of Ohio was not *res judicata*, and an attempt is made to distinguish the cases relied on by respondent and the Circuit Court of Appeals.[4]

In chronological order the first case is *Baldwin vs. Iowa State Traveling Men's Assoc.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517. In this case a suit was instituted in the Missouri state court and removed to the District Court, whereupon the defendant appeared specially and moved to quash and dismiss for want of service. After the hearing, the motion was overruled with leave to plead within thirty days. No plea having been filed, the cause proceeded to judgment. Thereafter, the plaintiff brought suit on the judgment in the District Court for Iowa, and the defendant set up as a defense that it had not been served on the Missouri judgment,

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(3) *Rooker vs. Fidelity Trust Co.*, 263 U. S. 413.

(4) *American Surety Co. vs. Baldwin*, 287 U. S. 156;
Baldwin vs. Iowa State Traveling Men's Assoc., 283 U. S. 522; 75 L. Ed. 1244; 51 S. Ct. 517;
Treinies vs. Sunshine Mining Co., 308 U. S. 66.

and hence the judgment was invalid, etc. The plaintiff objected to proof of such matters, claiming that the judgment on the motion in the first case was *res judicata*. In holding that the first judgment was *res judicata*, the Supreme Court in the opinion by Mr. Justice Roberts said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.
>
> "While this court has never been called upon to determine the specific question here raised, several federal courts have held the judgment *res judicata* in like circumstances. *Phelps vs. Mutual Life Assn.*, 112 Fed. 453; affirmed on other grounds, 190 U. S. 147; *Moch vs. Insurance Co.*, 10 Fed. 696; *Thomas vs. Virden*, 160 Fed. 418; *Chinn vs. Foster-Milburn Co.*, 195 Fed. 158. And we are in accord with this view." (Pages 524, 525, 526.)

The second case is *American Surety Company vs. Baldwin*, 287 U. S. 156. In this case a state court entered a judgment against a surety company without notice to it in violation of the due process clause of the Fourteenth Amendment. The surety company appeared in the state court and made a motion to vacate the judgment. The state court held that it had jurisdiction to enter the judgment, whereupon the surety company filed suit in the federal court for an injunction, claiming that

the action in the state court deprived it of due process of law. In holding that the decision of the state court on the motion to vacate was final and *res judicata*, the Supreme Court of the United States, in the opinion by Mr. Justice Brandeis, said:

> "* * * Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction *might have been presented to the State Supreme Court and reviewed here*, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction. Cf. *Fidelity Nat. Bank & Trust Co. vs. Swope*, 274 U. S. 123, 130-131." (Pages 164, 165, 166, 167.) (Italics ours.)

The third case is *Treinies vs. Sunshine Mining Company*, 308 U. S. 66. In that case this court held that a final decree of an Idaho state court of general jurisdiction in a suit to determine the ownership of personal property, awarding the property to the plaintiff and holding that a Probate Court of Washington which had awarded the property to another, under whom the defendant claimed, was without jurisdiction of the subject matter, was, as to the issue of the jurisdiction of the state courts, *res judicata* in a proceeding in the federal court interpleading the same plaintiff and defendant in respect of the same property. The opinion by Mr. Justice Reed concluded:

> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." (Page 78.)

A further illustration of the rule that any matter once litigated is as between the parties *res judicata* is given in *Stoll vs. Gottlieb*, 305 U. S. 165. In this case it appeared that a Federal District Court in a proceeding to reorganize a corporation under Section 77b of the Bankruptcy Act approved a plan of reorganization providing for a discharge of the debtor's bonds and cancellation of a personal guaranty thereof. One of the holders of the guaranteed bonds brought an action in the state court of Illinois upon the guaranty, and while that action was pending, he unsuccessfully petitioned the United States District Court to set aside or modify its order upon the ground that it had no jurisdiction to extinguish the guaranty. This court assumed that the bankruptcy court did not have jurisdiction of the subject matter of its order—the release, in reorganization, of a guarantor from his guaranty. The court, however, held that the question of jurisdiction over the subject matter was raised and decided by the bankruptcy court, and such determination was *res judicata* of that issue in the action pending in the state court. This court, in an opinion by Justice Reed, said:

> "* * * After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (Page 172.)

The opinion then reviews a large number of prior decisions and refers to the statement sometimes made distinguishing between "strictly jurisdictional facts" and "*quasi* jurisdictional facts." In regard to this distinction the opinion states:

> "* * * We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res adjudicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or *quasi*-jurisdictional." (Page 177.)

The petitioner attempts to distinguish this line of cases by stating that the doctrine of *res judicata* as applied to questions of jurisdiction "* * * is limited to determinations by state or federal courts of their own jurisdiction in the premises, * * *." (Petitioner's brief, page 28.)

We submit that there is nothing in the cases referred to that even inferentially supports this statement. In fact, the *Sunshine Mining Company case, supra,* specifically involves a determination by an Idaho court of the

jurisdiction of a Probate Court of the State of Washington.

There is no logical basis upon which a different rule can be applied in a situation such as is presented in our case from the rule universally followed in all other cases, that an actual contest and determination of an issue is *res judicata.*

The petitioner in his brief discusses several cases that state, even if they do not necessarily hold, that the Federal District Court has a right to determine the removability of a cause independently of the jurisdiction and determination of the state courts. (Petitioner's brief, page 23, *et seq.*)

As stated by this court in *Webster vs. Fall,* 266 U. S. 507:

> "* * * We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New vs. Oklahoma,* 195 U. S. 252, 256; *Tefft, Weller & Co. vs. Munsuri,* 222 U. S. 114, 119; *United States vs. More,* 3 Cr. 159, 172; *The Edward,* 1 Wheat. 261, 275-276. * * *" (Page 511.)

In not a single case referred to by the petitioner is there any mention or discussion of the applicability of the requirement that the court give full faith and credit to the judgment of the state court. (R. S. 905, 28 U. S. C. A. 687.) The confusion resulting from the rule con-

tended for by the petitioner is demonstrated in the opinions of virtually all of the cases petitioner cites in support of his contentions. Such confusion and the apparent conflict between the statutes in question should be eliminated by this court. We submit that it is vastly more important that the federal courts give full faith and credit to the judgments of the state courts, and that a matter once litigated be foreclosed forever, than it is to preserve any supposed privilege in the federal court to make a re-examination of a question that is admittedly determined by the state law and which has been properly submitted to the state courts for determination.

One of petitioner's contentions (petitioner's brief, pages 32 and 33) is that while the petitioner is subject to the same limitations as the state court in deciding whether or not "the cause was improperly removed" under Section 28 of the Judicial Code, Section 37,

> "• • • the power of the Federal District Court to enforce its jurisdictional limitations is by contrast unlimited • • • so that if it appears to the satisfaction of said court at *any time after* such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, said court must proceed no further therein, but must dismiss or remand the suit to the court from whence it was removed. • • •" (Petitioner's brief, page 33.)

A reading of the cases the petitioner cites in support of the foregoing statement demonstrates that he is limited to a factual inquiry of either the amount in dispute or the citizenship of the parties as those facts existed *at the time of removal* and not, as stated by the petitioner,

as those facts exist "at any time after such suit has been removed."

It is well settled that the federal court does not lose jurisdiction once it has attached, even though the plaintiff may amend to reduce his claim below the jurisdictional amount;[5] the plaintiff dismisses the case after the defendant has filed a counterclaim below the juristional amount;[6] the residence of the parties is changed or a substitution is made so that the requisite diversity of citizenship no longer exists;[7] the plaintiff files an amended pleading which would not have warranted a removal originally;[8] or even if it appears from the original petition that the defendant has a valid defense on the merits if asserted.[9]

Obviously the result of the case does not affect or determine the jurisdiction of the federal court. If it did, the court could never enter a judgment for the plaintiff for less than $3,000 and could never enter a judgment for the defendant, but would always be required to remand the cause to the state courts.

The result is, as pointed out by this court in the case

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(5) *Kanouse vs. Martin*, 15 How. 198;
St. Paul Indemnity Co. vs. Cab Co., 303 U. S. 283.

(6) *Kirby vs. American Soda Fountain Co.*, 194 U. S. 141, 146.

(7) *Morgan's Heirs vs. Morgan*, 2 Wheat. 290, 297;
Mollan vs. Torrance, 9 Wheat. 537;
Dunn vs. Clarke, 8 Pet. 1;
Clarke vs. Mathewson, 12 Pet. 164;
Phelps vs. Oaks, 117 U. S. 236;
Hardenberg vs. Ray, 151 U. S. 112;
Wichita R. & Light Co. vs. Public Utitlities Comm'n, 260 U. S. 48.

(8) *Pullman Co. vs. Jenkins*, 305 U. S. 534, 537.

(9) *Interstate B. & L. Ass'n. vs. Edgefield Hotel Co.*, 109 Fed. 692;
Armstrong vs. Walters, 219 Fed. 320;
Mullins Lumber Co. vs. Williamson & Brown Land Co., 246 Fed. 232.

of *Employers Corporation vs. Bryant,* 299 U. S. 374, Sections 28 and 37 of the Judicial Code are in *pari materia* and should be construed together. The right to removal of a separate suit or a separable controversy depends solely upon the allegations of the petition at the time the removal is sought. A determination by the District Court whether "the cause was improperly removed," under Section 28 of the Judicial Code, or a determination by the District Court whether "such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court," under Section 37 of the Judicial Code, involve precisely the same questions.

The petitioner contends (pages 38, *et seq.* of petitioner's brief), "The Petitions for Removal Were Insufficient to Warrant a Removal on the Ground of Separable Controversy." This unquestionably merely involves a review of the decision by the state courts which the petitioner conceded in his brief in support of his petition for *certiorari* to be *res judicata.* (See page 24 of that brief.)

The petitioner argues that the petitions for removal were defective because they did not in terms state that "a separable controversy" existed. The existence of a separable controversy or of a separate suit which entitled Armour to remove was dependent entirely upon the allegations of the plaintiff's petition, and it is well settled that the petition for removal should only include statements of fact not already appearing on the record.(10)

(10) *Chesapeake & Ohio Railroad vs. Cockrell,* 232 U. S. 146.

3. The Decision of the Supreme Court of Ohio was Reviewable by This Court on Certiorari. (Judicial Code, Section 237, Amended; 28 U. S. C. A. 344.)

It is the petitioner's contention (petitioner's brief, pages 41-43) that the judgment rendered by the Supreme Court of Ohio, directing the Court of Common Pleas of that state to grant the respondent's petition to remove these causes to the District Court of the United States, was not reviewable by this court on *certiorari*. The petitioner admits that if the Ohio courts had "* * * refused to permit the respondent to remove the case to the Federal District Court, then there would have been a denial of a federal right. * * *"[11] However, the petitioner argues that because the federal claim was sustained, the judgment of the Supreme Court of Ohio was not subject to review by this court on writ of *certiorari*.

We submit that the petitioner's argument is completely answered by the express phraseology of the statute in question, as it is specifically provided that "* * * the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. * * *"[12] It is equally apparent

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(11) *Chesapeake & Ohio Ry. Co. vs. McCabe*, 213 U. S. 207; *Cincinnati & Texas Pacific Ry. Co. vs. Bohon*, 200 U. S. 221; *Missouri, Kansas & Tex. Ry. Co. vs. Missouri Rd. & Warehouse Commissioners*, 183 U. S. 53.

(12) Judicial Code, Section 237, amended; 28 U. S. C. A. 344:

* * * * * *

"(b) It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States;

that the asserted right of Kniess *et al.* to prevent removal of the cases from the state courts to the federal court was a "* * * right, privilege, or immunity * * * claimed by either party under the Constitution * * * or statute of * * * the United States; * * *" *i.e.*, Judicial Code, Section 28, Amended (28 U. S. C. A. 71).

Since the decision of the Supreme Court of Ohio might have been reviewed by the Supreme Court of the United States, that decision was a bar to the petitioner's attempt to re-examine the question decided by the state court.[13]

4. Petitioner's Order of Remand in the George E. Kniess Case Denied Respondent the Right to Amend the Petition for Removal as Requested in Respondent's Motion Therefor, Pursuant to Judicial Code Section 274c. (March 3, 1915, c. 90, 38 Stat. 956; 28 U. S. C. A. 399).

The effect of the claim that one of the plaintiffs is an alien is involved only in the *George E. Kniess case* and is not involved in the other four cases.

George E. Kniess filed an affidavit stating that by neglecting to secure his second papers he was technically still an alien and a subject of Germany. Like all

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or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on *certiorari* under this paragraph."

(13) *American Surety Co. vs. Baldwin, supra*, note 4.

the affidavits this was filed after respondent had answered in the District Court, a stipulation signed by all parties had been filed, and an amended petition filed by Kniess *et al.* In reply to this affidavit, respondent stated that it would check the citizenship of George Kniess and, pursuant to Judicial Code Section 274c, 28 U. S. C. A. 399, file its motion to amend its petition for removal if it were proven that George Kniess was in fact an alien. Before any check could be made by respondent with the Department of Labor regarding Kniess' citizenship, the petitioner, without any finding on the question, or reference to it or to respondent's motion to amend, ordered all five cases remanded.

Assuming for the sake of argument that Kniess' alleged citizenship had any bearing on the petitioner's order in this one case, which respondent does not concede, the respondent's rights to amend are secured by Judicial Code 274c, which provides:

> "Wherein any suit brought in or removed from any state court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal."

The question how the rights granted by the above statute, first enacted in 1915, are to be enforced had never been passed upon prior to the decision of the Court of Appeals in this case. Obviously, if an amendment is refused and the case dismissed, the error could be corrected by an appeal. When, as in our case, the motion to amend is ignored and the cause remanded, the only method of enforcing the right secured by this statute is by a writ of mandamus. We submit that if any conflict exists between Judicial Code 274c and Judicial Code Sections 28 and 37, the provisions of Judicial Code 274c should prevail, as it was more recently enacted.

Assuming Kniess to be an alien (and petitioner has never made any finding in regard to that question) under the decision of the Supreme Court of Ohio, the *George Kniess case* against respondent was a separate and distinct suit from his case against defendant Burmeister, and properly removable to the District Court.

We agree that a cause cannot be removed on the ground of separable controversy when the plaintiff is an alien. However, it is well settled that where the plaintiff has joined in the same petition a separate suit against one defendant with a separate and distinct suit against another defendant, either separate suit may be removed on the grounds of diversity, whether the plaintiff is an alien or a citizen.(14)

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(14) *Lucania, etc., vs. U. S. Corporation*, 15 Fed. (2d) 568;
Stewart et al. vs. Nebraska Tire & Rubber Co., 39 Fed. (2d) 309;
Tillman vs. Russo Asiatic Bank, 51 Fed. (2d) 1023;
Hammer et al. vs. British Type Investors, Inc., 15 Fed. Supp. 497;
Rogge vs. Michael Del Balso, Inc., 15 Fed. Supp. 499;
Young vs. Southern Pacific Co., 15 Fed. (2d) 280.
The foregoing cases hold that a right of removal exists as to a "sep-

The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess case* that two separate suits had been improperly combined in the petition and in fact reversed as to the defendant Burmeister, solely on the ground that his demurrer for misjoinder of parties should have been sustained. The holding by the Supreme Court of Ohio in the *Kniess case* is discussed somewhat further in *Losito vs. Kruse, Jr.*, 136 O. S. 183 (decided January 3, 1940). After citing the *Kniess case* and several others, the court said at page 187:

> "* * * In such case *there can be no joinder in a single action* of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition it is demurrable for misjoinder of parties defendant. If it does not appear on the face of the petition but develops from the evidence on the trial, the plaintiff may, on motion, be required to elect as to which one of the two he will pursue, dismissing the other from the action, but not necessarily from the claim. *Canton Provision Co. vs. Gauder, supra; Bello vs. City of Cleveland, supra; Morris vs Woodburn, supra; Village of Mineral City vs. Gilbow, supra; French, Admr., vs. Central Construction Co.*, 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N.S.) 669; *City of Rochester vs. Campbell*, 123 N. Y. 405, 25 N. E. 937; *City of Chicago vs. Robbins*, 67 U. S. (2 Black) 418, 17 L. Ed. 298."

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arate suit" even though it is permissible under the state practice to join it in the same petition with a "non-removable suit."

It necessarily follows that the right to remove exists in the five cases against Armour where the joinder in the same petition of the claims against Burmeister is not under the Ohio law permitted.

In other words, had the cases remained in the state court, the plaintiffs would be required to file a separate petition against Armour and a separate petition against Burmeister[15] under the provisions of Ohio General Code 11312, which provides:

> "Procedure if causes are misjoined. When a demurrer is sustained on the ground of misjoinder of several causes of action, on motion of the plaintiff the court may allow him, with or without costs, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and be proceeded in without further service."

What has been our contention in the past, and will be our contention in the future, is sensed by the opinion of the Court of Appeals where it is stated:

> "* * * It is somewhat difficult to understand why the plaintiff in the action should seek to remand the case to a State Court already foreclosed from its consideration by the mandate of the Supreme Court of Ohio to which it must bow. * * *" (109 Fed. (2d) 72, pages 75-76.)

Entirely off the record the petitioner discusses the right of Kniess *et al.* to amend in the state court. This is misleading as petitioner neglects to state that Kniess *et al.* have unsuccessfully attempted to amend in the Supreme Court of Ohio both before and after petitioner's purported order of remand, and likewise unsuccessfully attempted to amend in the Common Pleas Court of Lucas County. We know no rule of law that would warrant the Court of Common Pleas of Lucas

(15) *Compare McGowan vs. Rishel*, 125 O. S. 77, 80.

County, Ohio, in disregarding the mandate of the Supreme Court of Ohio upon the order of the petitioner.

5. The Orders of Remand Entered by Petitioner are Not Reviewable by Appeal or Error, and Being in Excess of Petitioner's Jurisdiction, a Writ of Mandamus Is the Proper Method of Correcting the Error.

The respondent concedes that an order of remand by a District Court is not reviewable by appeal or writ of error and likewise concedes that the usual order of remand following an original determination of the question by the District Court is not reviewable by way of a writ of mandamus.[16]

It is the contention of Armour in the instant case that the action of the District Court went beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the state courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the state courts.

After an extended search, we have been unable to find any case precisely identical with our case, where the courts have either granted or refused a writ of mandamus to compel a District Court to set aside an order of remand, on the ground that the matter had been previously passed upon and decided by the state courts. This is not particularly surprising, as it would be extremely rare for the federal courts to disregard a decision of the state courts upon a question where the state law is admittedly conclusive.

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(16) *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 378-381.

However, we have found two cases where the federal courts have issued an order of mandamus to the District Courts where the order of remand in the lower courts involved something more than a mere remand of the case.

The leading case on that question is *In re Metropolitan Trust Company* (1910), 218 U. S. 312. In this case it appeared that a suit had been brought against the Trust Company and others in the state courts of New York, which suit was thereafter removed to the federal court on the ground that there was a separable controversy. The complainant moved to remand the cause, which motion was denied. After the removal the Trust Company demurred. The United States District Court sustained the demurrer and dismissed the complaint as to the Trust Company. The other defendants then answered, and after a final decree in the defendant's favor was entered, the complainant appealed to the Circuit Court of Appeals, but did not seek a review of the decree dismissing the Trust Company.

The Circuit Court of Appeals decided that there was not a separable controversy and that the motion to remand should have been granted. After the order of remand was entered in the Circuit Court, the complainant moved to vacate the decree and remand the cause as to the Trust Company, which motion the court granted. The Trust Company then applied to the Supreme Court for a writ of prohibition and mandamus. In granting the writ of mandamus, the Supreme Court, in an opinion by Justice Hughes, said:

> "• • • After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he

desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

"To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in *In re Pollitz, supra.* The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion;' and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force." (Pages 320, 321.)

The foregoing case was recently followed in an identical case by the 4th Circuit Court of Appeals, in *Windholz vs. Everitt* (C. C. A. 4, 1935) 74 Fed. (2d) 834.

Another case that recognizes the reviewability of an order of a District Court which remands a case but goes beyond the usual order of remand is *Waco vs. U. S. F. & G. Co.*, 293 U. S. 140. In this case, after removal, the District Court dismissed a cross action and remanded the case to the state court. This court held that the order dismissing the cross action, if not

reversed or set aside, was conclusive and appealable. In the course of the opinion, at page 143, the court said:

> "* * * True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner."

A case that distinctly states the rule for which we are contending is *Wiley vs. Judge of Allegan Court*, 29 Mich. 488, at page 495 where the court says:

> "* * * The true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law (at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such shape as to give the power judicially thus to determine it) then such determination however erroneous cannot be reviewed. * * * But if the case before the lower court does not, upon its facts or the evidence, legitimately raise the question of law or fact it has assumed to decide, so that the court could act judicially upon it, or so as to give the court the power judicially to make the decision it has assumed to make, then its action is not properly judicial and no assumed determination of it, nor any order resting upon it, will preclude the remedy by mandamus. * * *"

The foregoing decision is peculiarly appropriate to our case. We contend, as is so clearly pointed out in that case, that the District Court improperly assumed to decide a question that was not, on the record before

the District Court, presented to it for determination. In other words, we do not seek a review of the correctness or incorrectness of the court's decision but claim that the question was not open for decision as it had previously been litigated by the adverse parties and decided by the Supreme Court of Ohio.

The mere form of the application made to the District Court does not determine the issue decided. The question before this court is not whether mandamus is proper to review an order made in response to a petition designated as a motion to remand, but whether a District Court of the United States has power to review a decision of the Supreme Court of Ohio and in the attempted exercise of that power divest itself of jurisdiction of a controversy committed to it under the laws of the United States. Mandamus is the appropriate remedy where the District Court asserts a power it does not have.(17)

Moreover, the question was not before the District Court for the further reason that Kniess *et al.* had filed amended complaints in the District Court and entered into stipulations (see paragraphs Nos. 13 and 14 of petition for writ of mandamus), thereby waiving any formal defects in the petition for removal. The Supreme Court of the United States has held that such action waives any formal defects. The case we refer to is *In re Moore,* 209 U. S. 490, the first headnote in this case being as follows:

> "In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff

(17) *Metropolitan Trust Co.,* 218 U. S. 312;
Windholz vs. Everitt, 74 Fed. (2d) 834.

after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court."

As we have pointed out, the question was not presented for determination to the District Court for two reasons. First, the question had previously been determined by the Supreme Court of Ohio, and second, the proceedings taken by Kniess *et al.* in filing amended complaints and entering stipulations in the District Court waived any formal defects in the petitions for removal.

Petitioner suggests that his jurisdiction was terminated when he sustained the motion to remand and that he is now without authority to vacate the orders to remand and "execute the mandate of the United States Circuit Court of Appeals." In support of that contention, petitioner refers to *Ausbrooks vs. Western Union Telegraph Co.*, 282 Fed. 733, decided by the District Court, M. D., Tennessee, Nashville Division, July 19, 1921, but an examination of that case discloses that the court did not consider the question of whether it had authority to vacate the orders previously entered and "execute the mandate of the United States Circuit Court of Appeals." Petitioner's contention in this respect is in effect an assertion of power in the District Court to determine whether it shall execute the mandate of the United States Circuit Court of Appeals.

VI

CONCLUSION

The question is whether it is more important to preserve a supposed privilege in the District Court to make a re-examination of a question that is admittedly determined by the state law and which has been properly submitted to and determined by the state courts, or whether, as we contend, it is more important that the federal courts give full faith and credit to the judgments of the state courts, and that a matter once litigated be foreclosed forever.

We submit that the decision of the United States Circuit Court of Appeals in this case accords full faith and credit to the judgment of the Supreme Court of Ohio; assures all parties a full hearing and fair determination of their contention touching upon a respondent's right to remove these cases to the District Court of the United States; and preserves the mutual comity and respect that should exist between the state and federal courts.

Respectfully submitted,

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P. 4

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1940.

Frank L. Kloeb, Judge of the District Court of the United States for the Northern District of Ohio, Western Division,

vs.

Armour & Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondents, Armour & Company, a Kentucky corporation, by petition obtained from the Circuit Court of Appeals, Sixth Circuit, an order directing the U. S. District Judge, Northern District of Ohio, to set aside the remands of five separate actions. The opinion of the Court made the following statement concerning the basic issue.

"A number of persons, including George E. Kniess, brought suit against Armour and Company in the Court of Common Pleas of Lucas County for damages claimed to have been suffered in the consumption of food products, materials for which were prepared by Armour and Company, but which were processed by a retailer in Toledo by the name of Burmeister. In each of the five cases, and upon identical petitions, the plaintiffs joined Burmeister as a defendant on the theory that he and the Armour Company were joint tortfeasors. Armour and Company filed its petitions for removal with the Court of Common Pleas accompanied by proper removal bonds. Its petitions were contested by the plaintiffs and were denied. The Kniess case proceeded to trial while the other cases were held in abeyance and it eventually reached the Supreme Court of Ohio, 134 O. S. 432. That court disposed of the case upon the sole ground that the removal petition should have been allowed, because a separable controversy existed as between plaintiff and Armour. It stated the law of Ohio to be that where the responsibility of two tortfeasors differs in degree and in nature, liability cannot be joint and the alleged torts are not concurrent. Holding that the defendant Armour and Company had adequately preserved its exceptions to the ruling of the lower court, the cause was reversed and remanded to the Court of Common Pleas with instructions to grant the removal petition, and the mandate directed the Court of Com-

mon Pleas to remove the cause to the District Court of the United States.

"When the case came before the respondent the plaintiff moved to remand and, notwithstanding the adjudication by the Ohio Supreme Court which had become final, the respondent proceeded to take evidence upon the question of a separable controversy, decided there was none, that the cause was not removable under the statute, entered an order to remand the case to the Court of Common Pleas of Lucas County, and denied petitions for rehearing."

The District Judge rendered no opinion to support his actions; but responding to the rule from the Circuit Court of Appeals to show cause, he cited *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, referred to affidavits filed in support of the motions and said that upon consideration of the entire record, he became satisfied that none of the five suits "really and substantially involved a dispute or separable controversy wholly between citizens of different states which could be fully determined as between them, and therefore none of said causes were within the jurisdiction of the District Court of the United States, and further that plaintiff Kniess is an alien."

Title 28, U. S. Code provides—

"Section 71—Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

"Section 80—If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

Employers Corporation v. *Bryant*, 299 U. S. 374, 380, 381, says of these sections: "They are in pari materia, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey* v. *Lockhart*, 123 U. S. 56, 58,

that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."

The Court below concluded: "The District Court had no power to determine the issue of separable controversy entitling the petitioner to remove because that issue had already been adjudicated by the Supreme Court of Ohio, and the District Court, upon familiar principles, was bound by such adjudication."

And it said—"It would seem that in the use in Section 71 of the words 'the district court shall decide,' and in the employment in Section 80 of the phrase 'it shall appear to the satisfaction of the said district court,' it was within the contemplation of the Congress that the statute should apply to those cases in which there was some issue which, as a matter of primary decision, was submitted to the District Judge. It certainly could not have been intended to apply to decision of a question which was not properly at issue before the District Judge since it had already been adjudicated by the Supreme Court of Ohio in the same proceeding, between the same parties, and upon the plaintiff's petition. To hold otherwise would be to permit the District Court to defy the statute 28 U. S. C. A. § 687, which provides: 'The records and judicial proceedings of the courts of any State . . . shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.'"

Also—"The decision in *Employers Reinsurance Corporation* v. *Bryant, District Judge, supra,* and in *Re Pennsylvania Company, supra,* must not, in our judgment, be extended beyond the situations requiring the application of the rule there announced, that is to say, to cases where the issue of the petition to remand called for original and primary decision by the District Court unfettered by the doctrine of res judicata or the mandate of the 'full faith and credit' statute."

"That the decision of the Ohio Court was res judicata notwithstanding the issue was one involving the jurisdiction of a federal Court, is settled by *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298; *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, and the decision in *Evelyn Treinies, Petitioner,* v. *Sunshine Mining Co., et al.,* 60 S. Ct. 44, 84 L. Ed. —, announced as recently as November 6, 1939.

"While the precise question here involved is one of first impression, the Supreme Court in *Re Metropolitan Trust Company,* 218 U. S. 312, 31 S. Ct. 18, 54 L. Ed. 1051, has drawn the distinctions be-

tween orders to remand erroneously issued and those issued by a District Judge in excess of his authority. The former may not be challenged by appeal or writ of mandamus—the latter are a nullity. We think it follows that under general supervisory powers they may be set aside."

We cannot accept the conclusion of the Circuit Court of Appeals. It derives from an inadequate appraisal of the record and of sections 71 and 80 U. S. Code, *supra*.

These sections were designed to limit possible review of orders remanding causes and thus prevent delay. *In re Pennsylvania Co.*, 137 ~~143~~ U. S. 451, 454. They entrust determination concerning such matter to the informed judicial discretion of the district court and cut off review.

In this cause the district judge weighed the petitions and relevant affidavits and concluded that the controversy was not within the jurisdiction of that court. His clear duty was to proceed no further and to dismiss or remand the causes. The statute exempted his action from review.

The suggestion that the federal district court had no power to consider the entire record and pass upon the question of separability, because this point had been finally settled by the Supreme Court of Ohio, finds no adequate support in the cases cited by the opinion below: *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, *American Surety Company* v. *Baldwin*, 287 U. S. 156 and *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66. None of these causes involved a situation comparable to the one here presented.

Section 72, Title 28, U. S. Code, provides the requisites for removing causes from state to federal courts and directs that when complied with, the state court shall proceed no further. The Supreme Court of Ohio declared: "In passing upon the question of removal, unfortunately we are limited solely to a consideration of the facts stated in the petition." It held that upon them the trial court should have relinquished jurisdiction.

The causes went to the federal district court and additional facts were there presented. As required by the statute, that court considered all the relevant facts, petitions and affidavits, exercised its discretion and ordered the remands. Jurisdiction to decide, we think, is clear; the Circuit Court of Appeals lacked power to review the remand.

The challenged order must be reversed.